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CLARENCE A. BERDAHL

D. PHILIP LOCKLIN

RAYMOND P. STEARNS

Wartime Experiences
of the
National Labor Relations
Board

1941 - 1945

BY FRED WITNEY

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PREFACE

AN ANALYSIS of the war period indicates that the National Labor Relations Board was deeply involved in World War II. As the result of the unprecedented level of wartime employment and trade union organizational activities, the Board was required to dispose of an enormous wartime work load. In addition, the majority of the Board's World War II cases involved industrial facilities directly engaged in the production of war materials. Millions of war production workers resorted to the machinery of the N.L.R.B. for the adjustment of their organizational disputes. Apart from these considerations, the wartime work of the N.L.R.B. was further affected by (1) the enactment of wartime legislation; (2) the creation of federal war labor agencies; and (3) the development of wartime problems arising apart from wartime legislation and labor agencies.

The chief purpose of this study is to present a critical, rather than historical or statistical, analysis of the National Labor Relations Board's World War II experiences. In evaluating, for example, N.L.R.B. wartime policies, attention has been particularly given to the effects of these doctrines on wartime production, and to their consistency with basic principles of the National Labor Relations Act.

No attempt is made to present an analysis of the Labor Management Relations Act, 1947, the law which supplants the National Labor Relations Act. Such a task does not properly fall within the bounds of a study dealing with the problems and experiences of the N.L.R.B. during World War II. However, reference is made to the 1947 labor law whenever provisions of this law (had it been in effect in the war period) might have affected the manner in which the N.L.R.B. resolved some of its wartime problems.

It is hoped that the study will serve to throw more light on the proper role of government in the area of collective bargaining. As several of the N.L.R.B. wartime rulings were reaffirmed in the postwar period, it is believed that a presentation of the circumstances under which the precedents were originally adopted will also be of value. Finally, the study could be of particular significance in the event of any subsequent national emergency, such as a future war.

This study was first presented in June, 1947, to the Graduate College of the University of Illinois in partial fulfillment of the requirements for the degree of Doctor of Philosophy in Economics, and an abstract of the manuscript was published at that time.

I wish to express my deep gratitude to Professor E. B. McNatt who directed the original study and who later aided in its revision for pub-

lication. His high standards of scholarship, critical observations, conscientious efforts, and sincere interest have been invaluable in the development of the project. The financial aid and other assistance provided by the Social Science Research Council materially facilitated the preparation of the study. I am further indebted to Professor William C. Cleveland, acting Chairman of the Department of Economics, Indiana University, who arranged my teaching schedule so that the revision of the study might be accomplished. And to my wife, Judith, many thanks for her typing duties and for her effective assistance in disposing of many of the technical problems which arose in connection with the original study and with its revision.

All conclusions, opinions, and shortcomings of the study are, of course, the sole responsibility of the writer.

FRED WITNEY

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INTRODUCTION

Economic and Social Basis of the Act

Collective bargaining springs mainly from the desire of workers to improve their economic status. It is commonplace to point out that "from the dawn of human history, man has striven without ceasing to maintain or improve his common lot. A large wage earning class . . . struggled to exist and when existence was assured they also struggled to better their manner of living."¹ Motivated by the natural longing for a better economic existence, workers are confronted with the practical problem of accomplishing their purpose. In some instances their problems have been resolved through the cooperation of sympathetic employers. Social legislation, such as minimum wage and maximum hour laws, social security measures, and occupational safety statutes also have materially advanced labor's economic welfare. Apart from these factors, labor has also sought to improve its status through collective action.

Employees, who are impotent as single individuals, tend to increase their economic strength by organizing into associations, and by presenting their demands to management as a unified body. Though an employer is not greatly disturbed if one worker quits his job because of dissatisfaction with conditions of employment, he is compelled to be vitally concerned if his entire labor force, or a significant portion of it, collectively stops work. As workers organize into labor unions for collective action and mutual benefits, the disparity in bargaining power between management and labor tends to decrease. By bargaining as a unit, workers are able to sell their services more in accord with their desires and consequently can utilize the collective bargaining process to realize better wages and other improved conditions of employment.

If labor history demonstrated that management had not interfered with the organization of labor unions, and had not resisted the procedure of collective bargaining, legislation protecting workers in the exercise of their right of collective action would, of course, not be necessary. A survey of the facts indicates, however, that some employers have actively opposed the organization of labor and the process of collective bargaining.² Some of the methods utilized by employers in their attempts to defeat the development and practices of trade unions include the employment of labor spies, discrimination against union members, maltreatment of union organizers, the "yellow dog" contract, the organization of company-domi-

¹ E. E. Cummins, *The Labor Problem in the United States* (D. Van Nostrand Company, New York, 1932), p. iii.

² C. R. Daugherty, *Labor Problems in American Industry* (Houghton Mifflin Company, Boston, 1938), p. 635.

nated unions, the "blacklist" and the "whitelist," anti-union propaganda campaigns, "citizen committees," "back-to-work" movements, strike-breaking activities, private police forces, and, of course, refusal to recognize and bargain collectively with representatives of their employee trade unions.³

Even though confronted with hostile opposition, some employees were still determined to improve their economic status through collective action. To offset employer interference, employees utilized their chief economic weapon — the strike. Workers engaged in the strike in order to force management to recognize their labor organizations, to compel employers to bargain collectively with their bargaining representatives, and to prompt employers to cease interfering with the organization of their labor unions. Labor history indicates that employees have made wide use of the organizational strike. During the period 1919-1933, union organizational issues alone or in a combination with other causes accounted for approximately 24 per cent of all strikes, and in 1934, 45.9 per cent of all work stoppages resulted from the same causes.⁴ The Supreme Court of the United States recognized the seriousness of this problem in industrial relations when it said: "Refusal to confer and to negotiate has been one of the most prolific causes of strife. This is such an outstanding fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."⁵

Collective bargaining strikes, like all work stoppages, interfere with the effective operation of the economic system. A democratic government, responsive to the requirements of the social welfare, would be expected to deal with the problem. To remedy the situation, legislation could be enacted which would declare organizational strikes unlawful. Beyond the practical obstacles relating to the effective enforcement of such a law, this type of legislation is objectionable because of its apparent inconsistency with the principles of democracy. Instead of prohibiting the organizational strike, Congress and state legislatures could enact legislation which would eliminate the causes for these work stoppages. Specifically the nation's lawmakers could protect employees in their right to organize and bargain collectively. Such legislation would not, of course, confer any new rights on employees. All people by virtue of their membership in a free society possess the right to organize into mutual benefit associations. As early as 1842 this fact was judicially recognized and trade unions *per se* were

³ See *Violations of Free Speech and Rights of Labor; Report of the Committee on Education and Labor Pursuant to S. Res. 266 (74th Congress)*. Senator Robert M. La Follette's committee reports embody, perhaps, the most exhaustive and authoritative treatment of the methods utilized to interfere with the right of labor to organize and bargain collectively.

⁴ *Monthly Labor Review*, July, 1934, vol. 39, p. 75; and January, 1936, vol. 42, p. 162.

⁵ *N.L.R.B. v. Jones and Laughlin Steel Corporation*, 301 U.S. (1937), 1, 42.

ruled lawful organizations.⁶ Rather than creating any new rights, legal encouragement of the collective bargaining process would merely implement an existing right.

Prompted by these considerations, Congress, in 1926, enacted the Railway Labor Act.⁷ In general terms, the law prohibited railway employers from interfering with the growth and development of their employees' trade unions and with the collective bargaining process. In 1934, the railway law was amended in order to strengthen the protection afforded to the railway workers.⁸ In 1933 Congress attempted to extend statutory guarantee of collective bargaining rights throughout all industry. Section 7a of the 1933 National Industrial Recovery Act provided that all workers engaged in interstate commerce had the right to self-organization and collective bargaining without employer interference. Shortly after the passage of the law, President Roosevelt appointed a board which was empowered to enforce Section 7a.⁹ However, when the N.I.R.A. was ruled unconstitutional in 1935, the protective labor features embodied in the law were invalidated.¹⁰

Principles of the Act

Notwithstanding the *Schechter* decision, Congress still desired to decrease the number of strikes caused by the denial of employees' right to organize and bargain collectively. Accordingly Congress, on June 27, 1935, enacted the National Labor Relations Act¹¹ and on July 5, 1935, President Roosevelt approved the legislation. With respect to collective bargaining strikes, the Wagner Act states that "the denial by employers of the rights of employees to organize and the refusal by employers to accept the procedures of collective bargaining lead to strikes and other forms of industrial strife and unrest."¹² Furthermore, collective bargaining strikes, according to the Act, burden and obstruct commerce among the states, and inasmuch as experience has proved that statutory guarantee of the right to employees to organize and bargain collectively promotes the flow of commerce,¹³ Congress declared that encouragement of the practice and

⁶ *Commonwealth of Massachusetts v. Hunt*, 4 Metcalf 111, 45 Mass. 111. ⁷ 44 Stat. 577.

⁸ 48 Stat. 1185. For a comparison of the Railway Laws of 1926 and 1934, see E. B. McNatt, "The Amended Railway Labor Act of 1934," *The Southern Economic Journal*, vol. 5, no. 2, October, 1939.

⁹ Public Resolution No. 44, passed by Congress and approved by the President on June 16, 1934.

¹⁰ *Schechter Poultry Corporation v. United States*, 295 U.S. 495 (1935).

¹¹ Act of July 5, 1935, 49 Stat. 449; the law was popularly styled the "Wagner Act" inasmuch as Senator Robert Wagner of New York was the leading proponent of the law. The terms "Wagner Act" and "National Labor Relations Act" therefore will be used interchangeably. In addition, these terms refer to the National Labor Relations Act as passed by Congress in 1935 and not to the Labor-Management Relations Act, 1947 (Taft-Hartley Act), Public Law 101, 80th Congress, 1st Session. ¹² *Ibid.*, Sec. 1, par. 1.

¹³ Specifically, the Wagner Act, in this respect, states: "Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest." No doubt Congress in part referred to the operation of the

cedure of collective bargaining constituted national policy. Thus the National Labor Relations Act states:

It is hereby declared to be the policy of the United States to eliminate the causes certain substantial obstructions to the free flow of commerce and to mitigate and remove these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment and other mutual aid or protection.¹⁴

To implement the national policy, the Wagner Act in Section 7 declares that "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." As suggested before, Congress in this respect merely reaffirmed an existing right possessed by all employees by virtue of their membership in a democratic society. Indeed if the law stopped at this point no innovation in national labor policy would have been accomplished. Employers would still be able to impede the development of trade unions and organizational strikes would still be effected. To remedy this condition it would appear necessary that Congress forbid employers from interfering with the growth and development of labor unions. In addition it would evidently be indispensable to require them to recognize and bargain collectively with the representatives of their employees' labor organizations. In this manner the justification for the collective bargaining strike would be eliminated, and commerce among the states would be liberated from a material obstruction.

Accordingly the National Labor Relations Act declared as unlawful employer practices which have frequently caused organizational strikes. Specifically the law states that it is an unfair labor practice for an employer¹⁵ (1) to interfere with, restrain, or coerce employees in the exercise of their organizational rights; (2) to dominate or interfere with the management or administration of any labor organization or contribute financial support to it; (3) by discrimination in regard to hire, or tenure of employment or any term or condition of employment to encourage or

the Railway Labor Act when it declared that "experience proved" that statutory implementation of collective bargaining rights frees commerce from a material burden. Labor history demonstrates the successful operation of the Railway Labor Act. With the exception of the two-day postwar railway strike which occurred in the spring of 1946, the railroad industry has been singularly free from labor disturbances. The successful operation of the law motivated one student of the problem to conclude "the experience of the amended Railway Labor Act leads us to the conclusion that there is much to be said for the characterization of this Act as representing a model labor policy, based on equality and equitable relations." See McNatt, "The Amended Railway Labor Act of 1934," p. 196.

¹⁴ National Labor Relations Act, Sec. 1, par. 4

¹⁵ National Labor Relations Act, Sec. 8 The Labor-Management Relations Act, 1947, Sec. 8(b), defines several unfair labor practices of labor organizations.

discourage membership in any labor organization;¹⁶ (4) to discharge or otherwise discriminate against an employee because he filed charges or gave testimony under the Act; and (5) to refuse to bargain collectively with the representatives of his employees. Thus Congress prohibited those patterns of conduct which for many years have engendered collective bargaining strikes.

Beyond enumerating unfair labor practices Congress was required to take an additional step in order to "encourage the practice and procedures of collective bargaining." As noted, an employer violates the Wagner Act if he refuses to bargain collectively. Collective bargaining implies negotiations between representatives of management and representatives of employees. Consequently it was indispensable for Congress to state under what conditions an employer was refusing to bargain collectively. To resolve this problem Congress adopted the democratic principle of majority rule. For purposes of the National Labor Relations Act an employer violates the law only if he refuses to bargain with a union selected by a majority of his employees for purposes of collective bargaining. If the labor organization does not possess the support of the majority, an employer is under no statutory obligation to bargain.¹⁷ Still another principle of representative government was embodied in the Wagner Act. Under its terms a lawful bargaining agent represents all employees in the bargaining unit regardless of their membership status. A statutory labor organization bargains equally for members and non-members "in respect to rates of pay, wages, hours of employment, or other conditions of employment." Such a provision duplicates a familiar characteristic of our political life. A Democrat elected to the House of Representatives not only represents the Democrats in his district but the Republicans as well.¹⁸ Not only are the Republicans, in this illustration, represented by the Democratic representative, but they are equally bound to his decisions made in Congress.

Thus four basic principles underlie the National Labor Relations Act: (1) encouragement of the practice and procedures of collective bargaining; (2) employees are protected by law in their right to self-organization; (3) employers are required to bargain collectively with majority design-

¹⁶ However, a closed shop contract was lawful under the Wagner Act as long as the agreement was executed with a union representing a majority of the employees within the bargaining unit. Under the terms of the Labor-Management Relations Act, 1947, Sec. 8(b) (2), the closed shop is outlawed and the union shop and the maintenance of membership arrangement are permissible only after two conditions are satisfied: (1) a majority of the workers eligible to vote in a collective bargaining unit must signify a desire for these union security measures, Sec. 8(a) (3); and (2) there must be no state law prohibiting the execution of collective bargaining agreements requiring membership in a labor organization as a condition of employment, Sec. 14(b). For example, if the state of Georgia outlaws the union shop and the maintenance of membership arrangement, a labor organization may not point to the 1947 labor law as its authority to request either of these union security devices.

¹⁷ National Labor Relations Act, Sec. 9(a).

¹⁸ For an analysis of the "majority rule" policy, see R. R. Brooks, *Unions of Their Own Choosing* (Yale University Press, New Haven, 1937), p. 87.

nated unions; and (4) majority unions represent and bargain equally for union members and non-members within the bargaining unit.

Organization of the Board

Justification for administrative agencies created to implement a statute should be clear to students of political science. An expert body trained to administer a specific law appears to be a better agency for the administration of a statute than courts or legislative bodies. Congress or state legislatures, though able to set forth general policies in a statute, are often unable to fill in all the details of a law or effectively enforce the legislation. These functions are apparently more suited to administrative bodies. And, as might be expected, such agencies are found in most every area of economic life. Congress thus created a three-member National Labor Relations Board for the purpose of administration and enforcement of the National Labor Relations Act. Under the Act's terms the President of the United States, with the advice and consent of the Senate, was empowered to appoint the members of the Board.¹⁹ Each member served for five years, was eligible for reappointment, and might be removed from office by the President only "for neglect of duty or malfeasance in office."²⁰

In accordance with the fundamental principles underlying the Wagner Act, the N.L.R.B. is charged with the responsibility of making meaningful the right of employees to self-organization and collective bargaining. To render these rights effective the Board is empowered "to prevent any person from engaging in any unfair labor practice."²¹ Therein exists the basis for one major administrative problem of the National Labor Relations Board. It must in each instance determine whether a specific act of an employer is unlawful within the meaning of the Wagner Act. Though Congress forbade employers from engaging in general patterns of conduct, it is the Board's responsibility to rule in every case whether a violation was committed. The N.L.R.B. must spell out what constitutes "interference," "coercion," and "restraint"; must determine what "discrimination" embraces within the meaning of the law; decide under what conditions a union is company-dominated; and rule under what circumstances an employer fails to bargain collectively with his employees' union.²²

Ordinarily the Board, operating through its field offices, will conduct an investigation and hearing to determine whether the Act has been

¹⁹ National Labor Relations Act, Sec. 3(a). The Labor-Management Relations Act, 1947, Sec. 3(a), provides for a five-member Board. Of greater importance, the office of the General Counsel is set up by the 1947 labor law, Sec. 3(b). The General Counsel has final authority in the investigation of unfair labor practice charges, the issuance of complaints on the basis of these charges, and the prosecution of the complaints before the N.L.R.B. Stripped of its investigating and prosecution powers in unfair labor practice cases, the N.L.R.B. now performs the function of a labor court, deciding these cases only after they are referred to it by the General Counsel.

²⁰ *Ibid.*, Sec. 3(a). ²¹ *Ibid.*, Sec. 10(b)

²² For a thorough statement of Board policy in this respect, see National Labor Relations Board, *Sixth Annual Report* (1941), pp. 41-53.

violated. If the entire proceeding demonstrates that an employer did engage in unfair labor practices, the Wagner Act directs the Board to effect compliance with the law. For example, if a worker is discharged because of union activities, the Board is empowered to take "such affirmative action, including reinstatement of employees with or without back pay as will effectuate the policies of the Act."²³ Apart from directing reinstatement and awarding back pay, the N.L.R.B. is authorized, in appropriate cases, to require persons violating the act "to make reports from time to time showing the extent to which [they have] complied with the order." Other affirmative orders which the Board may issue include those which direct the disestablishment of company-dominated unions, and which require employers to bargain collectively with majority designated labor organizations. On the other hand the N.L.R.B. is empowered to issue negative or "cease and desist" orders. It may, for example, direct an employer to cease and desist from giving unlawful support to a labor organization, spreading false rumors relative to the virtues of his employees' labor union, utilizing the "yellow dog" contract, engaging in espionage, employing strike-breakers, slugging and beating union organizers, or discriminating against union members. Where, however, the Board finds through its investigations and hearings that no violation has occurred, the Wagner Act directs the N.L.R.B. to "issue an order dismissing the complaint." In fact, 355, or 15.4 per cent of all unfair labor practice charges filed with the Board in the fiscal year 1945 were dismissed during the investigation period.²⁴

If an employer refuses to comply with an order, the Board is empowered "to petition any circuit court of appeals of the United States . . . for the enforcement of such order."²⁵ In any such court proceeding, the findings of the Board as to the facts, if supported by evidence, are conclusive. Should the court find that the law was violated, it may issue the necessary decree that will effectuate the purposes of the Act. On the other hand the court may find the Board's order to be in error. Under such circumstances the matter will be dismissed unless the N.L.R.B. desires to appeal the case to the Supreme Court of the United States. Apart from enabling the Board to petition the federal courts for enforcing orders, the Wagner Act also provides that "any person aggrieved by a final order of the Board . . . may obtain a review of such order in any circuit court of appeals of the United States."²⁶ While reviewing such a case the court may enforce, modify, or set aside the Board's order. In addition any party dissatisfied with the circuit court's ruling may petition the Supreme Court of the United States for final determination of the matter. Final disposition of a case, therefore, may not be realized until

²³ National Labor Relations Act, Sec. 10(c).

²⁴ National Labor Relations Board, *Tenth Annual Report* (1945), p. 84.

²⁵ National Labor Relations Act, Sec. 10(e). ²⁶ *Ibid.*, Sec. 10(f).

the highest court in the land has spoken. The federal courts constitute the forum in which N.L.R.B. orders may be ultimately enforced, modified, or dismissed.

Apart from enforcing the unfair labor practice provisions of the Wagner Act, the N.L.R.B. is also charged with the duty of implementing the Act's majority rule principle. Under the statute's terms, the Board is directed "to certify to the parties, in writing, the name or names of the representatives that have been designated or selected."²⁷ However, before any determination can be made of the bargaining desires of a unit of employees, it appears necessary that the N.L.R.B. must designate which workers are to be included in the bargaining unit. Unlike political elections in which voting units are ordinarily rigidly and clearly defined, voting groups in industry have no predetermined delineations. We can look to no map to determine finally which group of workers constitutes a bargaining unit within certain industrial facilities. Prompted by this obvious fact, and still recognizing the need for the designation of the bargaining unit, the National Labor Relations Act directs the N.L.R.B. to "decide in each case . . . the unit appropriate for the purposes of collective bargaining."²⁸ In view of the complexity of modern industry the law does not designate the form of the unit. Congress apparently believed that in some cases the collective bargaining process would be furthered if the bargaining unit would be designated along craft lines. In other instances effective collective bargaining would be more likely obtained through a unit determined along industrial lines. Accordingly the Wagner Act, in Section 9, empowers the Board to "decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise effectuate the policies of the Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." The Board, however, is compelled to designate the unit in each case that will insure effective collective bargaining.

The determination of the appropriate bargaining unit constitutes another major N.L.R.B. administrative problem. To dispose of this duty the Board has established a series of guides to aid it in the designation of the bargaining unit.²⁹ Factors which the Board has considered in determining what unit is appropriate include (1) the history, extent, and type of organization of the employees in a plant; (2) the history of their collective bargaining; (3) the history, extent, and type of organization and the collective bargaining of employees in other plants of the same

²⁷ *Ibid.*, Sec. 9(c).

²⁸ *Ibid.*, Sec. 9(b). The power of the N.L.R.B. to designate the appropriate bargaining unit has been circumscribed by the Labor-Management Relations Act, 1947, Sec. 9.

²⁹ National Labor Relations Board, *Sixth Annual Report* (1941), pp. 63-71. See also chap. 9 where additional treatment is made of this phase of the Board's work.

employer, or of other employers in the same industry; (4) the skill, wages, work, and working conditions of the employees; (5) the desires of the employees; (6) the eligibility of the employees for membership in the union or unions involved in the proceeding and in other labor organizations; and (7) the relationship between the unit or units proposed and the employer's organization, management, and operation of the plant.³⁰ As might be expected, in a particular case one or more of the factors might be controlling, and in another case different factors might be more controlling.

The complexity and varied nature of modern industry makes the task of designating the appropriate bargaining unit extremely difficult. It could be expected that the N.L.R.B. would be the target for criticism springing from dissatisfied trade unions and employers. An existing labor organization would be expected to protest vociferously a unit which tends to weaken its position in a plant. An employer may be similarly dissatisfied if the unit is designated in a manner not conforming to his desires. Finally the split in the labor movement continues to add to the difficulty of the problem. Both C.I.O. and A.F.L. unions could be expected to criticize the Board's rulings whenever these organizations believe themselves to be treated discriminatorily. But it may be contended that the difficulty of the task is even exceeded by its ramifications and implications. The determination of the bargaining unit can shape the entire structural form of the labor movement. Whether industrial or craft unions shall prevail in a given industry may depend on the policy of the National Labor Relations Board. Again a unit may be determined in a manner which might yield a majority of votes to one organization and not to another. Whether an A.F.L. or C.I.O. union shall rule in a plant or within an industry can also be greatly influenced by Board decisions.

After the unit has been determined the Board can then proceed to ascertain the bargaining desires of the employees included within the classification. For this purpose the N.L.R.B., in accordance with the terms of the Wagner Act, "may take a secret ballot of employees."³¹ In addition the law enables the Board to "utilize any other suitable method" to determine the majority union. Consequently other proofs of majority representation have been utilized. Among the more common of these include the utilization of paid-up membership cards, affidavits, or petitions.³² Such proofs of representation are then ordinarily "cross-checked" against the number of workers in the appropriate unit to determine the union's

³⁰ National Labor Relations Board, *Fourth Annual Report* (1939), p. 83.

³¹ National Labor Relations Act, Sec. 9(c).

³² *In the matter of Armour and Company*, 3 N.L.R.B. 895 (1937); *In the matter of National Refining Company*, 5 N.L.R.B. 794 (1938); *In the matter of Petroleum Iron Works Company*, 3 N.L.R.B. 774 (1937). Under the terms of the Labor-Management Relations Act, 1947, Sec. 9(c), the Board may only use the election technique to determine the bargaining desires of the employees within an appropriate bargaining unit.

majority status. Usually such a "cross-check" involves the use of the company pay roll. However, where competing unions are involved in a representation dispute,³³ or where an employer protests against the use of the "cross-check" method,³⁴ the Board has ordinarily directed a secret election to determine employees' bargaining desires. A union will usually be certified as the statutory bargaining representative if it succeeds in polling a majority of the votes cast in the bargaining election.³⁵ However, if a "substantial number of eligible voters fail to participate in the election, the Board will not issue the coveted certification.³⁶ Once certified, the union, as noted before, becomes the bargaining agent for all workers in the unit "regardless of membership or non-membership in the union and regardless of whether they voted for it, against it, or not at all."³⁷ When properly requested an employer must, moreover, bargain collectively with representatives of the certified union and must recognize the union as the exclusive agent of all the workers within the unit.³⁸

Jurisdiction of the Board

In accordance with the provisions of the Constitution of the United States, the National Labor Relations Act, a federal law, purports to eliminate the causes of collective bargaining strikes only to the extent that they burden interstate commerce. By virtue of this limitation the N.L.R.B. upon many occasions has "formally declined to take jurisdiction of cases upon the ground that the situation was beyond the Board's constitutional authority."³⁹ It follows, therefore, that the primary requisite that must be met before the Board can assume jurisdiction of a case is that the economic activities involved fall within the concept of interstate

³³ *In the matter of Cudahy Packing Company*, 13 N.L.R.B. 526 (1939).

³⁴ *In the matter of Armour and Company*, 13 N.L.R.B. 567 (1939).

³⁵ The meaning of the term "majority" was subject to several interpretations. Originally, a union would not be certified unless it polled a majority of those eligible to vote. In one case, under that early rule, no certification was issued where 700 were eligible, but only 125 voted. *In the matter of Chrysler Corporation*, 1 N.L.R.B. 164 (1936). In a later case, the Board changed the meaning of the term and issued certifications where a majority of those voting chose a representative, provided a majority of those eligible to vote participated in the election. *In the matter of Associated Press*, 1 N.L.R.B. 686 (1936). That rule was in effect until the *RCA Manufacturing* case (2 N.L.R.B. 159, 1936). In this case, "a local company union put on a campaign to boycott the election. The campaign consisted of the distribution of circulars predicting violence, bloodshed, rioting, street fighting, and general disorder, and perhaps loss of life if the workers took part in the election." Brooks, *Unions of Their Own Choosing*, p. 94. The company union's campaign was successful and less than a majority of the eligible voters participated. Even though out of the 3163 votes cast, 3016 were cast in favor of the nationally affiliated union, no certification was issued. Realizing that its previous rule encouraged such coercion and intimidation, the Board now requires that a union merely poll a majority of the votes cast to qualify it for certification.

³⁶ Apparently "there is no categorical or mathematical criterion for 'substantial.'" See D. O. Bowman, *Public Control of Labor Relations* (The Macmillan Company, New York, 1942), p. 142. However, a circuit court ruled that an employer was not relieved of the responsibility to bargain with a certified union even though only 20 per cent of the eligible voters cast ballots in the bargaining election. Thus the N.L.R.B. will apparently certify a labor organization even though 80 per cent of the eligible voters stay away from the polls. See *N.L.R.B. v. National Mineral Company*, 134 Fed. (2d) 424 (CCA-7, 1943).

³⁷ Brooks, *Unions of Their Own Choosing*, p. 87.

³⁸ *In the matter of Louisville Refrining Company*, 4 N.L.R.B. 844 (1937), enforced 308 U.S. 568 (1940).

³⁹ National Labor Relations Board, *First Annual Report* (1936), p. 135.

commerce. An employer is not liable under the terms of the Wagner Act if his business is not related to trade among the states. Conversely if a company is engaged in interstate commerce the law is applicable to its industrial relations. Furthermore only employees who are engaged in interstate commerce are protected by the provisions of the Wagner Act.⁴⁰

As might be expected, extreme situations did not cause the Board much trouble in deciding whether it properly could assume jurisdiction of a particular case. Early in its history the Board voluntarily refused to entertain cases involving the retail trades or other purely local businesses. On the other hand it applied the Wagner Act without hesitation to interstate motor bus lines, motor truck transportation, and water transportation firms.⁴¹ The problem became more difficult and of vital significance, however, in those situations which are not completely interstate or intrastate. It is in this twilight zone where interstate and intrastate economic activity blend imperceptibly that the issue becomes of particular importance. For example, if the Board was precluded from exercising jurisdiction over cases involving manufacturing industries, the bulk of the nation's organizable employees would be placed beyond the scope of the Wagner Act. As the jurisdictional problem was of a constitutional nature, the Supreme Court of the United States ultimately established the limits of the Board's power.

In the light of judicial precedent there was much reason to believe that the Supreme Court would hold manufacturing facilities beyond the power of the National Labor Relations Board.⁴² But in the celebrated *Jones and Laughlin case*,⁴³ the Supreme Court greatly expanded the scope of the Board's jurisdiction when it held the provisions of the National Labor Relations Act applicable to manufacturing and production establishments.⁴⁴ On this score Chief Justice Hughes, speaking for the majority of the Court, declared

⁴⁰ Some states enacted so-called "little Wagner Acts" to afford statutory protection to employees engaged in intrastate commerce. See Utah State Labor Relations Act, chap. 55, Laws 1937, March 23, 1937; New York State Labor Relations Act, chap. 443, Laws 1937, May 20, 1937, as amended; Massachusetts State Labor Relations Act, chap. 23, General Laws, approved originally on August 28, 1937; Rhode Island State Labor Relations Act, chap. 1066, Laws of 1941, effective July 1, 1941, as amended; Connecticut State Labor Relations Act, Sections 933h-946h, supplement to the General Statutes, April 17, 1945. The states of Wisconsin and Pennsylvania originally enacted similar protective laws. Thus Wisconsin passed a "little Wagner Act" on April 15, 1937, but later repealed the legislation and enacted in its place a so-called "Employment Peace Act" (chap. 57, Laws of 1939, May 4, 1939, as amended). Similarly, Pennsylvania enacted a "little Wagner Act" on July 1, 1937 (Act No. 294), but later weakened the Act's protective features by amending the law on June 9, 1939 (Pennsylvania Laws of 1939, No. 162).

⁴¹ National Labor Relations Board, *Second Annual Report* (1937), p. 52.

⁴² Thus in *U.S.A. v. Knight*, 156 U.S. (1894), 1, 12, the Court ruled that "commerce succeeds to manufacturing and is not a part of it." In *Adair v. U.S.A.*, 208 U.S. (1908), 161, 178, the Court said "what possible legal or logical connection is there between an employee's membership in a labor organization and the carrying on of interstate commerce." Again in *Carter v. Carter Coal Company*, 298 U.S. 238 (1936) the Supreme Court could not see how the regulation of the labor relations of a coal company advanced and safeguarded interstate commerce.

⁴³ *N.L.R.B. v. Jones and Laughlin Steel Corporation*, 301 U.S. 1 (April 12, 1937).

⁴⁴ *Ibid.*, pp. 44-49. In this case, the Supreme Court also held that the Wagner Act did not violate the constitution in respect to due process of law. It found that the law neither violated "substantive due process" nor "procedural due process."

... the question remains as to the effect upon interstate commerce of the labor practices involved. . . . The stoppage of those operations by industrial strife would have a most serious effect upon interstate commerce. In view of respondent's far flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our natural life and to deal with the question of direct and indirect effects in an intellectual vacuum It is not necessary again to detail the facts as to the respondent's enterprise. Instead of being beyond the pale, we think that it presents in a most striking way the close and intimate relation which a manufacturing industry may have to interstate commerce and we have no doubt that Congress had constitutional authority to safeguard the right of respondent employees to self-organizational freedom in the choice of representatives for collective bargaining.⁴⁵

Subsequent Supreme Court decisions broadened still further the jurisdictional area of the National Labor Relations Board. Whereas the Jones and Laughlin Steel Corporation imported and exported materials in interstate commerce, later decisions held the law applicable to firms which either exported goods,⁴⁶ or imported material.⁴⁷ A local public utility supplying energy to enterprises engaged in interstate commerce was also deemed within the scope of the Board's jurisdiction.⁴⁸ In another case the Supreme Court rejected the contention that an employer's operations must be large enough to be of great national importance in order to fall within the scope of the Wagner Act.⁴⁹ More recent decisions held the law applicable to a national fraternal organization,⁵⁰ a local transportation system in an industrial city,⁵¹ a large retail department store,⁵² and to a charitable hospital which derived a substantial revenue from the sale of medical services and from the sale of supplies secured from commercial enterprises engaged in interstate commerce.⁵³ The Supreme Court has liberally construed the interstate commerce clause for the purposes of the National Labor Relations Act. By placing a broad interpretation on this term, the provisions of the Act are made available to an increasing number of the nation's workers.

Apart from limiting the application of the law to interstate commerce, Congress specifically exempted certain categories of employees from the Wagner Act's provisions. Under its terms, domestic servants, individuals employed by their parents or spouses, and agricultural laborers are placed

⁴⁵ *Ibid.*, pp. 41 and 43.

⁴⁶ *Santa Cruz Fruit Packing Company v. N.L.R.B.*, 303 U.S. 453 (1938).

⁴⁷ *N.L.R.B. v. Abell Company*, 97 Fed. (2d) 951 (CCA-4, 1938); *Newport News Shipbuilding and Dry Dock Company v. Schaeffer*, 303 U.S. 54 (1938).

⁴⁸ *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. 197 (1938).

⁴⁹ *N.L.R.B. v. Fainblatt*, 306 U.S. (1939), 601, 607. In this case, the Court ruled that the operation of the Act does not "depend on any particular volume of commerce affected more than that to which courts would apply the maxim *de minimis*."

⁵⁰ *Polish National Alliance v. N.L.R.B.*, 322 U.S. 643 (1944).

⁵¹ *N.L.R.B. v. Baltimore Transit Company*, 140 Fed. (2d) 51 (CCA-4); certiorari denied 321 U.S. 796 (1944).

⁵² *N.L.R.B. v. J. L. Hudson Company*, 135 Fed. (2d) 380 (CCA-6); certiorari denied by the Supreme Court of the United States, October 11, 1943. In this case, the store imported most of its merchandise from outside the state, and exported a small amount of its sales outside of its home state.

⁵³ *N.L.R.B. v. Central Dispensary and Emergency Hospital*, 145 Fed. (2d) 852 (App. D.C.); certiorari denied 324 U.S. 847 (1945).

beyond the Board's jurisdiction.⁵⁴ In 1946, for the first time since the law's enactment, Congress attempted to define the meaning of "agricultural laborers." For eleven years the Board exclusively interpreted its meaning, and interpreted it in accordance with the popular conception of the term. In one case the Board held that "although the term 'agricultural laborer' is not defined in the Act, its meaning is not obscure. The guidepost is the ordinary meaning of the phrase, that stemming from common usage and common understanding. The term 'agricultural laborer,' as commonly understood, refers to a person employed on a farm in the cultivation of the soil, including the harvesting of crops and the rearing and management of livestock."⁵⁵ However, in 1946 Congress broadened the meaning of the term.⁵⁶ Specifically the term "agricultural laborers" for the purposes of the National Labor Relations Act was defined in the same manner as appears in the Fair Labor Standards Act.⁵⁷ To comply with this amendment, the N.L.R.B. will henceforth be required to consider the construction which the courts have placed on the term as embodied in the Fair Labor Standards Act. At one time the N.L.R.B. declared that the phrase was subject to an "extremely broad" interpretation.⁵⁸ Accordingly it is to be expected that some employees, who formerly were embraced by the terms of the Wagner Act, will lose statutory protection of their bargaining rights. Congress has partially reduced the broad coverage of the application of the law as developed by the National Labor Relations Board and as sustained by the Supreme Court.⁵⁹

Prewar Experience

Close consideration of the terms of the National Labor Relations Act will clarify some of the popular misunderstandings which have surrounded the law. As noted, its administrative agency, the National Labor Relations Board, may operate only within the area of interstate commerce. Moreover, the Board is not a conciliation or mediation agency. When President

⁵⁴ National Labor Relations Act, Sec. 2(3).

⁵⁵ *In the matter of Pepee Sugar Company*, 59 N.L.R.B. (1945), 1532, 1537.

⁵⁶ N.L.R.B. Appropriation Act 1947, Title IV, Act of July 26, 1946, Public Law 549, 79th Congress, 2d Session. The amendment constituted a limitation on the Board's appropriations and is stated as follows: "provided further that no part of the funds appropriated in this title shall be available to organize or assist in organizing agricultural laborers, as used in connection with investigations, hearings, directives, or orders concerning bargaining units composed of agricultural laborers as referred to in (the National Labor Relations Act) as defined in Sec 3(f) (the Fair Labor Standards Act)."

⁵⁷ Act of July 25, 1938, 52 Stat. 1060. Sec. 3(f) of the Fair Labor Standards Act defines agricultural laborer as follows: "agriculture includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur bearing animals, or poultry and practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market, or to carriers for transportation to market."

⁵⁸ *In the matter of Pepee Sugar Company*, *op. cit.*, p. 1539.

⁵⁹ The Labor-Management Relations Act, 1947, deprives foremen of all protection afforded by the N.L.R.B. and reduces the degree of support formerly extended to plant guards. Chaps 10 and 11 deal with the wartime relationship of the Board to foremen and plant guard unions.

Roosevelt approved the Wagner Act on July 5, 1935, he declared that "the Board is an independent quasi-judicial body. It should be clearly understood that it will not act as mediator nor as conciliator in labor disputes. . . . Compromise, the essence of mediation, has no place in the interpretation and enforcement of the law."⁶⁰ Since the Board protects workers only in the exercise of their rights to self-organization and collective bargaining, it is another misconception to believe that the agency (1) requires workers to join unions; (2) forces agreements between management and labor; (3) establishes conditions and terms of employment; or (4) precludes the discharge of employees for any reason other than for labor organization activities. On this score, Edwin S. Smith, a former Board member, pointed out that though the N.L.R.B. stands as the protector of employees' organizational rights, the agency "cannot tell workers what terms and conditions to demand . . . nor advise employers what demands they must accept."⁶¹ Finally it is incorrect to believe that the Wagner Act required the closed shop or that it purported to eliminate the causes for all strikes. Under its terms an employer was allowed to execute a closed shop agreement with a majority union without fear of violating the Wagner Act. Furthermore the law only eliminated the causes for collective bargaining strikes. Disputes over wages, hours, and other conditions of work will no doubt always be potential causes of work stoppages.

Apart from the fact that the law represented in large measure an innovation in public labor policy and restricted customary employer conduct, much of the original opposition to the Wagner Act probably emanated from the above indicated misconceptions as to its purposes and operation. But whatever the reasons, few laws passed by Congress occasioned so much immediate controversy. In fact a few months after President Roosevelt approved the law the National Lawyer's Committee of the American Liberty League declared that the Wagner Act was unconstitutional and indicated that there was no need to comply with its terms.⁶² Probably prompted in part by this premature announcement, many employers, before the *Jones and Laughlin* decision, disregarded both the law and N.L.R.B. orders. Commenting on this point, a Board member declared that "when the Board did make decisions, they were almost never obeyed, and it became apparent that this law, enacted by Congress and approved by the President, would not become law in reality until it received the approval of the Supreme Court."⁶³

After the Supreme Court's declaration of constitutionality, however,

⁶⁰ National Labor Relations Board, *First Annual Report* (1936), p. 9.

⁶¹ Bureau of Labor Statistics, *Labor Information Bulletin*, June, 1937, p. 1.

⁶² Daugherty, *op. cit.*, p. 937.

⁶³ National Labor Relations Board, *Press Release No. 357*, dated October 5, 1937.

much of the opposition subsided and the Board was able to give full attention to the execution of its duties. Rather than resisting Board orders, employers, subsequent to the *Jones and Laughlin* decision, in the large majority of cases voluntarily complied with the law when advised of unlawful conduct. In fact in the fiscal year 1940, only one year before the entry of the United States into World War II, the Board reported that it was able to secure voluntary compliance in 88.6 per cent of all unfair labor practice cases and in 73.1 per cent of all representation cases.⁸⁴ In other words the Board, by virtue of the voluntary cooperation of employers and employees, was able to close the vast majority of its cases without formal action. Moreover, by June 30, 1941, representation cases were almost of equal importance with unfair labor practice cases.⁸⁵ Consequently in 1941, for the first time in the Board's history, about one-half of the Board's activities involved the determination of bargaining agents. Instead of actively interfering with the right of employees to organize and bargain collectively, employers evidently were more anxious to learn with whom they were required to bargain.

At the time the United States entered World War II, the National Labor Relations Act had outgrown its infancy period. It had stood the test of constitutionality. Organized opposition to the law had in the main subsided. Instead there was a growing tendency among employers to accept the Act's principles in good faith. The National Labor Relations Board had established an imposing body of precedents. Original policies, where found inadequate, such as the interpretation of "majority rule," were modified. Its agents day by day were becoming more expert in the practical administration of the law. By December 7, 1941, the public, management, and labor were increasingly learning "to live" with the Act. It is highly significant that the Wagner Act served its infancy period during the five years preceding the war. If the National Labor Relations Act had been passed in 1941 instead of in 1935, one could hardly have expected that it would have been able to contribute much towards the promotion of labor peace during World War II. Instead of being the target of active opposition in the period of 1935-1937, the law, if passed in 1941, probably would have been subjected to the same treatment during the war years. However, by the time of the attack on Pearl Harbor, the Wagner Act, as administered by the National Labor Relations Board, was apparently ready to operate as an effective law in the war period.

Magnitude of Wartime Work

During the war years industry greatly expanded its facilities to accommodate the demands for wartime production and the level of employment

⁸⁴ National Labor Relations Board, *Tenth Annual Report* (1945), p. 12.

⁸⁵ *Infra*, Table 1, p. 25.

reached unprecedented heights.⁶⁶ As might be expected increased trade union activities followed the expansion of the level of employment.⁶⁷ Such augmented labor organization activities were reflected in the wartime work of the N.L.R.B. Whereas the Board conducted only 3386 representation elections or "cross-checks" during the fiscal years 1936-1940, in which 1,225,098 valid votes were cast, the N.L.R.B. in the years 1941-1945 administered 20,562 elections in which 4,889,627 workers cast valid ballots.⁶⁸ In other words, over 85 per cent of all the representation elections conducted by the Board during the first ten years of its operation were held in the war period. Beyond the absolute importance of representation cases, their comparative significance over unfair labor practice disputes greatly increased during the war years. While 19,119 unfair labor practice charges were filed with the Board in 1936-1940, only 18,187 such cases were instituted during World War II.⁶⁹ In this respect, the Board reports that while representation cases accounted for only 19 per cent of all the Board's cases in 1936, such cases constituted 75.1 per cent of the total in 1945. The same relative importance of representation cases is also noted in the other years of the war.⁷⁰

It is noteworthy that the major portion of the Board's activities during the war period involved the certification of bargaining representatives. The growth of the relative significance of representation cases indicates that the principles of the National Labor Relations Act had become more widely accepted. Rather than resisting the development and the activities of labor unions, employers were apparently more concerned with the determination of bargaining agents. Nonetheless the wartime importance of unfair labor practice cases should not be underestimated. It is recorded that the 18,187 wartime unfair labor practice cases involved 18,108,443 employees.⁷¹ Unfair labor practice cases, though of lesser comparative significance during the war period, were still of great absolute importance.

Much of the Board's wartime activities directly involved basic war

⁶⁶ One study concludes that the nation's labor force as of August, 1945, reached the level of 66,650,000. This number, which includes both civilian and military personnel, is compared with the 54,230,000 reported for 1939. Whereas 7,300,000 were unemployed in 1939, there were only 830,000 idle in August, 1945. *Monthly Labor Review*, October, 1945, vol. 61, p. v.

⁶⁷ Whereas in 1940 membership in all the nation's labor unions was reported at only 8,500,000, the figure reached the unprecedented level of 13,750,000 in 1944. Florence Peterson, *American Labor Unions* (Harper & Brothers, New York, 1945), p. 56.

⁶⁸ National Labor Relations Board, *Tenth Annual Report* (1945), p. 8.

⁶⁹ *Ibid.*, p. 6.

⁷⁰ During the fiscal year 1946, the Board received 12,260 cases. Of this number 69 per cent involved representation issues and 31 per cent dealt with unfair labor practice cases. National Labor Relations Board, *Eleventh Annual Report* (1946), p. 2.

⁷¹ See National Labor Relations Board, *Annual Reports* for years 1941-1945, pp. 26, 77, 85, 78, and 80 respectively. In unfair labor practice cases, "workers involved" are the number employed in the establishment affected by the case. This broad definition was adopted by the Board in 1941. Before that, the term "workers involved" included only those employees directly involved in a charge. National Labor Relations Board, *Seventh Annual Report* (1942), p. 16.

TABLE 1.—CASES FILED WITH THE N.L.R.B. DURING THE FISCAL YEARS 1936-1945 BY TYPE

Fiscal Year	Number of Cases			Per Cent of Total	
	All cases	Unfair labor practice cases	Representation cases	Unfair labor practice cases	Representation cases
1936-45	77,231	37,306	39,925	48 3	51 7
1936	1,068	865	203	81.0	19 0
1937	4,068	2,895	1,173	71 2	28.8
1938	10,430	6,807	3,623	65 3	34.7
1939	6,904	4,618	2,286	66.9	33.1
1940	6,177	3,934	2,243	63.7	36.3
1941	9,151	4,817	4,334	52 6	47.4
1942	10,977	4,967	6,010	45.2	54 8
1943	9,543	3,403	6,140	35.7	64.3
1944	9,176	2,573	6,603	28 0	72 0
1945	9,737	2,427	7,310	24.9	75.1

Source: National Labor Relations Board, *Tenth Annual Report* (1945), p. 6.

industries.⁷² More than 50 per cent of all elections conducted by the Board were held in nine fundamental war industries, which included those of iron and steel, machinery, food, chemicals, wholesale trade, electrical equipment, textiles, aircraft, and shipbuilding.⁷³ Approximately 50 per cent of all unfair labor practice cases involved the same nine industries.⁷⁴

Thus millions of war production workers resorted to the machinery of the National Labor Relations Board for adjustment of their disputes. War production probably would have been seriously retarded if employees had not had the opportunity to settle their organizational controversies through the Board's peaceful and democratic procedures.⁷⁵ Recognizing the importance of speedy disposition of wartime representation and unfair labor practice disputes, the Board streamlined its regulations under which disposition of the cases was made. By granting greater authority to its regional directors and by otherwise accommodating its procedures to the exigencies of war conditions, the N.L.R.B. attempted to decrease the time required to process its cases. By rapid certification of bargaining agents, and through speedy elimination of unfair labor practices, the N.L.R.B. hoped to abolish completely the justification for organizational strikes.⁷⁶

⁷² It could be reasonably defended that during a war, all industries are "war industries." But it would appear that iron and steel production is more directly related to a war effort than are the finance, insurance, and real estate industries.

⁷³ National Labor Relations Board, *Ninth Annual Report* (1944), p. 81.

⁷⁴ See National Labor Relations Board, *Annual Reports* for years 1941-1945, pp. 82, 81, 89, 79, and 22 respectively.

⁷⁵ See pp. 243-246, for an analysis of the problem of wartime organizational strikes.

⁷⁶ See pp. 236-238, for a discussion of N.L.R.B. wartime procedural changes.

Problems Caused by the War

In addition to greatly increasing the work load of the N.L.R.B., the war also created special problems which demanded solution. Congressional legislation imposed new duties on the N.L.R.B. and in part circumscribed its normal area of jurisdiction. In some quarters it was believed that by limiting the Board's power to invalidate collective bargaining contracts, stability in labor relations during the war period would be promoted. Consequently the N.L.R.B. was prohibited from proceeding in unfair labor practice cases springing from labor contracts which had not been challenged for three months. Enactment of this limitation seriously affected the Board's wartime operations.⁷⁷ Under the terms of the War Labor Disputes Act,⁷⁸ the N.L.R.B. was required to conduct strike elections among workers engaged in war production. Experience proved that much of the Board's wartime energy and funds were expended in the execution of these strike ballot duties. Apart from the strike-vote responsibilities, the Board was also required to reconcile substantive problems which stemmed from the War Labor Disputes Act. For example, the N.L.R.B. was compelled to decide whether employees who engaged in a strike in violation of the strike-vote provisions of the War Labor Disputes Act lost their rights under the Wagner Act.⁷⁹ Passage of wartime price control legislation caused the Board to resolve the delicate question of whether workers who effected a strike to force an employer to grant a wage increase in violation of the Wage Stabilization Act of October 2, 1942,⁸⁰ still retained their Wagner Act rights.⁸¹ Though it was not specifically a war measure, Congress, in 1943, enacted the Telegraph Merger Act⁸² which imposed additional duties on the N.L.R.B.⁸³

Apart from the issues created by enactment of wartime legislation, the N.L.R.B. was forced to determine many problems springing from the establishment of federal wartime labor agencies. To provide a legal forum in which wartime labor disputes could be reconciled peacefully, the President of the United States first established the National Defense Mediation Board,⁸⁴ and later created the more powerful National War Labor Board.⁸⁵ The relationship of the N.L.R.B. to these war agencies gave rise to many problems which required solution.⁸⁶ When the President of the United States established the Fair Employment Practices Committee,⁸⁷ the National Labor Relations Board recognized its obligation to further the principles under which the F.E.P.C. operated. Within the

⁷⁷ See chap. 2 for a discussion of the Congressional limitation.

⁷⁸ 57 Stat. 163 (June 25, 1943).

⁷⁹ See chap. 3 for an analysis of the N.L.R.B. experience with the War Labor Disputes Act.

⁸⁰ 56 Stat. 765. ⁸¹ See chap. 4. ⁸² 57 Stat. 5. ⁸³ See chap. 5.

⁸⁴ Executive Order 8716, dated March 19, 1941.

⁸⁵ Executive Order 9017, dated January 12, 1942.

⁸⁶ See chaps. 6 and 7 for a discussion of the issues involved in the relationship.

⁸⁷ Executive Order 8802, dated June 25, 1941, and Executive Order 9346, dated May 27, 1943.

scope of its jurisdictional limits the N.L.R.B. attempted to insure the full wartime utilization of the nation's labor supply.⁸⁸

Other wartime problems arose under the terms of the Wagner Act in addition to those which originated from the enactment of wartime legislation and from the creation of federal war labor agencies. War conditions hastened the organizational activities of foremen, and accordingly the Board was required to rule whether the protection of the National Labor Relations Act was to be extended to supervisors' unions.⁸⁹ A similar problem involved labor unions composed of plant protection employees. This issue became more complicated when the plant guards were inducted into the auxiliaries of the armed forces. The Board was compelled to decide whether militarized guards constituted a unit appropriate for the purposes of collective bargaining.⁹⁰ Wartime exigencies, in addition, influenced the Board to modify some of its previous principles with respect to the determination of the appropriate bargaining unit.⁹¹ Early in the war the Board was also confronted with the task of protecting servicemen in their rights under the Wagner Act. One of the most important problems in this connection involved the question of whether servicemen could vote in representation elections by mail.⁹² Former leading issues arising in unfair labor practice cases were made more difficult because of war conditions. For example, some employers have attempted in the past to influence representation elections by granting wage increases just prior to the election. This unfair labor practice was further complicated by the creation of the National War Labor Board and by the wartime wage stabilization program.⁹³

World War II greatly affected the operations of the N.L.R.B. Under the pressure of the increased work load occasioned by the unprecedented level of wartime employment and trade union activities, the N.L.R.B. was compelled to adjust its procedure to effect speedy disposition of its cases. Enactment of wartime legislation and the establishment of war labor agencies gave rise to delicate problems which required solution by the Board. Finally the N.L.R.B. was forced to decide many important issues which arose under the terms of the National Labor Relations Act apart from the passage of wartime legislation and separate from the creation of the war labor agencies.

⁸⁸ This phase of the Board's work is dealt with in chap. 8.

⁸⁹ See chap. 10.

⁹⁰ See chap. 11.

⁹¹ See chap. 9.

⁹² See chap. 12.

⁹³ See chap. 13.

PART I

Effects of Wartime Legislation

Chapter 2.

AMENDMENTS TO THE N.L.R.B. APPROPRIATION ACTS

The Nature of the Amendments

In July, 1943, Congress limited the power of the National Labor Relations Board to take action in unfair labor practice cases. This was accomplished by the enactment of an amendment to the N.L.R.B. Appropriation Act for the fiscal year 1944. Under the terms of the amendment, the N.L.R.B. was forbidden to spend any of its funds to prevent unfair labor practices arising over a collective bargaining agreement unless a charge had been filed before the agreement was three months old. However, the limitation was not effective unless a notice had been posted during the ninety-day challenge period informing all interested parties that a contract had been executed and that the agreement could be inspected at an accessible location. Developments soon disclosed that the practical effects of the amendment seriously limited some normal activities of the N.L.R.B. Because of a ruling by the Comptroller General of the United States, the 1944 amendment protected employers engaging in unfair labor practices stemming from contracts executed with company-dominated labor organizations. By virtue of another ruling of the Comptroller General, contracts executed with minority or company-dominated unions containing automatic renewal clauses could have operated as a permanent bar to N.L.R.B. remedial action.

As a result of the Board's experience with the 1944 limitation, the provision was restudied when Congress considered the N.L.R.B. Appropriation Act of 1945. When enacted, the 1945 amendment, which subsequently was reaffirmed by Congress for the fiscal years 1946 and 1947, removed company-dominated unions, and unfair labor practices arising from contracts executed with such organizations, from the protection of the limitation. In addition, the 1945 limitation afforded an annual opportunity for employees to challenge contracts which provide for automatic renewal. Finally, Congress, when it passed the Board's Appropriation Act for 1948, refused to extend the protection of the appropriation limitation to unfair labor practices stemming from collective bargaining agreements which involved minority unions. This chapter examines the background of these amendments, indicates their nature, and analyzes their effects on the wartime operations of the N.L.R.B.

The Kaiser Shipbuilding Cases

The motivating forces prompting the amendment to the N.L.R.B. Appropriation Act of 1944 were the celebrated *Kaiser Shipbuilding* cases.¹ As will be demonstrated, the cases involved a closed shop contract executed by Kaiser with an alleged minority and company-assisted labor organization. Early in the war production period the Kaiser northwest shipyards, similar to all war industries, were in the process of growth. On January 11, 1941, Kaiser received a contract from the United States Maritime Commission to construct shipyards in Portland, Oregon.² At peak production it was contemplated that about 30,000 workers would be employed in all the Kaiser northwest shipyards.³ On May 12, 1941, however, with only 86 employees hired in the Portland shipyards, Kaiser and an American Federation of Labor affiliated union executed a closed shop contract dealing with wages, hours, and other conditions of work.⁴ Kaiser later conceded that the 66 employees constituted about 1 per cent of the eventual working force.⁵ Fully aware that the N.L.R.B. would not entertain a certification petition under such circumstances, the parties executed the contract in the absence of a Board certification.⁶

During the months following the execution of this contract, employment in the shipyards increased by several thousand workers. A rather large share of the newly hired employees were members of the C.I.O. affiliated Industrial Union of Marine and Shipbuilding Workers. Because of the closed shop contract the company discharged many C.I.O. affiliated workers who refused, as a condition of employment, to join the A.F.L. union.⁷ Confronted with the possibility of losing its employment opportunities in the Pacific northwest shipyards, the C.I.O. union brought charges against the company in N.L.R.B. unfair labor practice proceedings.⁸ Specifically the C.I.O. affiliate charged that the company gave unlawful support to the A.F.L. union by permitting A.F.L. organizers to circulate a petition on company property and on company time. The C.I.O. also alleged that workers were discharged discriminatorily by virtue of an illegal contract, and that the total conduct of the employer

¹ *In the matter of Oregon Shipbuilding Corporation; In the matter of Kaiser Company, Inc.*, N.L.R.B. cases, Nos. 19-C-997, 19-C-1055, 19-C-1101. See also National Labor Relations Board, *Eighth Annual Report* (1943), p. 7, wherein the Board states: "the legislative history of the amendment shows that the purpose of its original sponsors was to prevent the Board from proceeding to issue a Decision and Order in the *Kaiser Shipbuilding* cases." See *infra*, pp. 44 and 46, for the text of the amendment.

² "Kaiser Contracts," *Business Week* (November 28, 1942), p. 94.

³ "Kaiser Pact with A.F.L.," *Business Week* (April 25, 1942), p. 73.

⁴ "Kaiser Contracts," *Business Week* (November 28, 1942), p. 95.

⁵ "Kaiser Fights," *Business Week* (January 16, 1943), p. 80.

⁶ During World War II the N.L.R.B. established the policy that it would not ordinarily institute representation proceedings unless at least 50 per cent of the contemplated working force was hired. *In the matter of Aluminum Company of America*, 52 N.L.R.B. 1040 (1943). See *infra*, p. 161, for a discussion of this problem.

⁷ "N.L.R.B. to Rule on Members' Bias," *Labor Relations Reporter* (December 21, 1942), vol. 11, p. 498.

⁸ *Supra*, *Kaiser Shipbuilding* cases.

was such as to discourage workers from joining labor organizations of their own choosing. The petition also alleged that the company executed the contract with a minority union.⁹

Upon investigation of the charges, the N.L.R.B. ruled that the charges were substantiated by sufficient evidence, and ordered a complaint issued, upon the basis of which the customary hearing was directed.¹⁰ Had the case proceeded in the usual manner, an intermediate report would have been issued on the basis of the hearing. Finally, the N.L.R.B. would have reached a decision in the matter based upon the intermediate report together with any other evidence submitted by the interested parties. If the N.L.R.B. found that the company did violate the Wagner Act, the contract executed by the company would not have precluded the N.L.R.B. from ordering remedial action. The Board, in accordance with established policy, would have ordered the employer to cease giving effect to the contract illegally consummated by the parties.¹¹ Notwithstanding the closed shop clause embodied in the agreement, the N.L.R.B., moreover, would have directed the reinstatement with back pay of all workers discharged by the employer. Furthermore the employer would have been directed to cease recognizing the company-assisted labor organization as the bargaining agent of its employees. It should be stressed that the alleged unlawful conduct of the employer stemmed from the closed shop contract executed by him with the alleged company-assisted trade union. It appears that those who were anxious to prevent the N.L.R.B. from proceeding in its customary manner in the *Kaiser Shipbuilding* cases would be required to seek Congressional action. In short, N.L.R.B. action could be precluded in the *Kaiser* cases by Congressional legislation which would forbid the Board from ordering remedial action in unfair labor practice cases arising out of a labor contract. Such a legislative proposal emanating from employer sources would probably not have been adopted by Congress. Since the enactment of the National Labor Relations Act in 1935, many proposals to amend the Act have been unsuccessfully introduced in Congress. The proposed amendments have ordinarily sprung from employer sources and farmer interests.¹² It should be pointed out, however, that the Wagner Act principles were becoming more widely accepted by management. This fact is evidenced in the decline of unfair labor practice cases and the increase of representation cases filed with the Board.¹³ However, it was reasonable to assume that Congress might listen more attentively to an amendment proposed by representatives of labor. In fact the American

⁹ "Kaiser Contracts," *Business Week* (November 28, 1942), p. 95.

¹⁰ National Labor Relations Board, *Ninth Annual Report* (1944), p. 4. As will be indicated, the N.L.R.B. was eventually required to terminate the *Kaiser Shipbuilding* cases because the appropriation limitation precluded further action in the proceedings. See *infra*, p. 51.

¹¹ National Labor Relations Board, *Seventh Annual Report* (1942), p. 55.

¹² See, for example, "Proposal for New Federal Labor Policy," *Labor Relations Reporter* (June 25, 1945), vol. 16, p. 577. ¹³ See *supra*, p. 24.

Federation of Labor did urge Congress to adopt just such an amendment to prevent the N.L.R.B. from proceeding in circumstances illustrated by the *Kaiser* cases.¹⁴

Proposed "Craft Amendment"

The American Federation of Labor has periodically attacked the N.L.R.B. as being biased in favor of the Congress of Industrial Organizations,¹⁵ and the C.I.O. has frequently made the same charge in reverse.¹⁶ The American Federation of Labor's chief criticism of the N.L.R.B. has been that the Board has fostered the industrial bargaining unit and has failed to give just consideration to the craft unit. According to the American Federation of Labor's contention the N.L.R.B. has tended to destroy the craft bargaining unit by grouping the employees of such units in larger industrial bargaining classifications. Stimulated by this alleged discrimination the A.F.L. has frequently urged amendments to the National Labor Relations Act designed to prohibit the N.L.R.B. from designating as appropriate any larger industrial unit when a craft unit exists. The major feature of such an amendment would require that when a craft exists, composed of one or more employees, such craft shall constitute an appropriate collective bargaining unit and may designate collective bargaining representatives.¹⁷ Notwithstanding the pressure exerted by the A.F.L., Congress had refused to give additional statutory protection to the craft unit. In the light of the principles underlying the Wagner Act, it is quite understandable why the N.L.R.B. contended such an amendment "would impose an intolerable administrative burden upon the Board in requiring determination of many hypothetical craft unions in each case, and would in the great majority of cases thwart, rather than carry out, the desires of employees."¹⁸ Adoption of the "craft amendment" could provide an employer with the opportunity to play one union against the other with the result of weakening the bargaining power of all unions involved. Again an employer who desires to bargain collectively with his employees in good faith might be confronted with several competing bargaining agents in one plant. Regardless of the desires of the employer involved, the certification of one or more craft units under the proposed A.F.L. amendment would be compulsory. Finally, the adoption of such

¹⁴ See pp. 36 and 37 for the text of the amendment subsequently adopted by the Congress.

¹⁵ American Federation of Labor, *Report of the Proceedings of the 63rd Annual Convention* (1943), p. 68.

¹⁶ See McNatt, "Appropriate Bargaining Unit Problem," *Quarterly Journal of Economics* (November, 1941), vol. 56, pp. 93-107.

¹⁷ "Congress Tackles the Labor Relations Act," *Congressional Digest* (June-July, 1939), vol. 18, Nos. 6-7, p. 174. The Labor-Management Relations Act, 1947, Sec. 9(b)(2), provides that the N.L.R.B. may not declare that a craft unit is not appropriate on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the craft unit vote against separate representation.

¹⁸ National Labor Relations Board, *Report of the N.L.R.B. to the Senate Committee on Education and Labor* (April, 1939), p. 39.

an A.F.L. sponsored amendment would appear as grossly unfair as an amendment which would statutorily require the Board to find the *industrial* unit appropriate in each instance.

Not only is the proposed A.F.L. amendment undesirable on the basis of its incompatibility with the principles of effective collective bargaining, but the record of the N.L.R.B. in this respect demonstrates that the Board has not discriminated against the A.F.L. Adoption of the "Globe doctrine,"¹⁹ and the Board's more recent policy of carving craft units out of established industrial classifications under certain circumstances²⁰ would appear to cast doubt on the A.F.L. charge of unfairness. One may question the proposition of N.L.R.B. anti-A.F.L. prejudice in the light of the election experience of the A.F.L. The facts indicate that when C.I.O. unions and A.F.L. affiliates have been contestants in Board elections the C.I.O. labor organizations have been victorious in the larger percentage of cases.²¹ It may be reasonably contended that the criticism of the A.F.L. against the N.L.R.B. might have originated from its unfavorable experience with N.L.R.B. elections. In this connection one student of labor relations considers such a criticism as equivalent to a charge of prejudice against the voting machine because it registers more votes for one candidate than another.²²

Criticism of the N.L.R.B. by the A.F.L. with respect to the agency's presumed prejudice against the craft unit must also be considered in relation to its companion complaint charging C.I.O. raiding of A.F.L. unions. In this respect the A.F.L. claims that the C.I.O. has "indulged in most unfair and unethical practices in raiding."²³ Moreover, such "raiding," the A.F.L. contends, occurs in "plants where American Federation of Labor unions have contracts."²⁴ According to the A.F.L. the C.I.O. would instigate organizing campaigns in such plants, and when it was believed that enough of the workers were converted to the C.I.O., a representation petition would be submitted to the N.L.R.B. by C.I.O. affiliates. In any subsequent representation elections, conducted by a Board allegedly prejudiced against the craft unit, the A.F.L. could lose and has lost numerous elections.²⁵ As a result of the elections won by the C.I.O. the Board would certify the C.I.O. affiliates with a resultant invalidation of the A.F.L. contracts. Such a situation, the A.F.L. felt, has worked undue hardships upon their organizations, and consequently the

¹⁹ *In the matter of Globe Machine and Stamping Company*, 3 N.L.R.B. 294 (1937).

²⁰ See *infra*, p. 159.

²¹ See National Labor Relations Board, *Tenth Annual Report* (1945), p. 86.

²² Brooks, *Unions of Their Own Choosing*, p. 164.

²³ American Federation of Labor, *Report of the Proceedings of the 64th Annual Convention* (1944), p. 155.

²⁴ American Federation of Labor, *Report of the Proceedings of the 63rd Annual Convention* (1943), p. 69.

²⁵ American Federation of Labor, *Report of the Proceedings of the 64th Annual Convention* (1944), pp. 156-57.

A.F.L. has pressed upon Congress the need for amending the National Labor Relations Act to afford greater protection to A.F.L. unions.

The American Federation of Labor's inability to obtain outright amendments to the Wagner Act prompted the A.F.L. "to make a different approach to the matter."²⁸ The "different approach" was to urge Congressional passage of a limitation to the appropriation bill providing funds for the N.L.R.B. By virtue of this restriction the A.F.L. believed that raiding by the C.I.O. of A.F.L. unions, aided by the election machinery of the N.L.R.B., would cease. If an A.F.L. union possessed a contract, the proposed appropriation amendment would prohibit the Board from ordering an employer to bargain collectively with a C.I.O. labor organization, even though the C.I.O. affiliate was victorious in a bargaining election. The C.I.O., reasoned the A.F.L., would be less anxious to make inroads in plants covered by an A.F.L. contract because, regardless of the success of C.I.O. unions in converting a majority of the workers to its membership, the N.L.R.B. could still not, by virtue of the proposed amendment, order the employer to bargain exclusively with the C.I.O. majority union. Moreover, the amendment would satisfy in a measure the A.F.L. complaint that the N.L.R.B. has adopted a discriminatory attitude toward craft units. As the amendment would nullify in part the results of N.L.R.B. elections, the A.F.L. would not be too greatly concerned with the manner in which the N.L.R.B. designated the appropriate bargaining unit. It was contemplated that the limitation on the spending powers of the N.L.R.B. at once would substantially adjust two alleged A.F.L. complaints—C.I.O. raiding of A.F.L. unions and the unfairness of the N.L.R.B. That the amendment might nullify the legitimate rights of a majority union was apparently ignored by the A.F.L. Neither did the A.F.L. evidently consider the fact that the N.L.R.B. does not select workers' bargaining representatives, but that such agents are selected through a secret election—an accepted method of the democratic process. Finally the fact that the N.L.R.B. has long followed the established policy of refusing to upset a contract executed by a legitimate labor organization until such agreement has been in effect a reasonable period of time, apparently did not deter the A.F.L. in urging the proposed limitation to the N.L.R.B. appropriation bill.

Amendment to the Appropriation Act of 1944

Congress considered the amendment to the N.L.R.B. Appropriation Act of 1944 in a climate favorable for swift adoption. The N.L.R.B. was preparing to render a decision in the *Kaiser* cases, and an adverse ruling for the company would invalidate its labor contract with the A.F.L. union.

²⁸ American Federation of Labor, *Report of the Proceedings of the 63rd Annual Convention* (1943), p. 68.

Such an N.L.R.B. ruling would probably result in an employees' representation election in the northwest shipyards, and in some quarters the belief existed that the effects of such an election would be detrimental to the production of vessels required to fight the war. As mentioned above, the A.F.L. was anxious to limit the authority of the N.L.R.B. with respect to the agency's authority to require employers to bargain with N.L.R.B. certified unions when an existing A.F.L. contract might be affected. This desire of a major labor organization for a limitation on the power of the N.L.R.B. was given serious consideration by Congress. Beyond these factors a considerable body of opinion existed in Congress that any amendment limiting the jurisdiction of the N.L.R.B. was desirable. As a result of all these considerations, the House of Representatives enacted an amendment to the N.L.R.B. Appropriation Act which was designed to limit the N.L.R.B. authority to invalidate a contract such as existed in the *Kaiser* cases.²⁷ Under the terms of the proposed amendment no employer unfair labor practice which stemmed from a labor contract could be enjoined by the N.L.R.B. unless a charge was filed before the contract was three months old. Once the ninety-day period had elapsed, the remedial powers of the N.L.R.B. would not be available. The National Labor Relations Board quickly offered severe criticism of the proposed House amendment. It pointed out that a contract could be kept secret for the ninety days, and further contended that the amendment would encourage abuse of the closed shop. Thus a worker could be legally discharged for his refusal to join a labor organization possessing a closed shop contract, regardless of whether the union was a minority organization or company-dominated. In this connection, the N.L.R.B. vigorously declared:

... it is inconceivable that a branch of Congress . . . would intentionally immunize the most lucrative labor racket which has perverted the war production program. No contract, regardless of whether made with a completely company-dominated union, or made with other unions as a result of collusion, fraud, or duress, and completely regardless of whether the contracting union has any members whatever among the employees affected can any longer be challenged if it has been in effect three months. Nothing whatever prevents the complete sweeping away of any and all restrictions on closed shop contracts by the simple device of keeping the contracts secret for the required 90 days. What such license would mean to professional labor organizers may be illustrated by the reported fact that in the *Kaiser* cases alone the annual revenue of a single A.F.L. local union has reached some \$3,000,000.00 a year.²⁸

The House amendment, if ultimately approved by Congress, would effectively limit the N.L.R.B. authority to issue a decision in the *Kaiser* cases. As noted, all of the employer's alleged unfair labor practices in these

²⁷ "N.L.R.A. Amendment by Control of Purse," *Labor Relations Reporter* (June 21, 1943), vol. 12, p. 595. The text of the House legislation follows: "No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement between management and labor which has been in existence for three months or longer without complaint being filed." ²⁸ *Ibid.*

cases issued from a labor contract which was in existence for longer than ninety days. Workers were discharged for refusal to join the A.F.L. union which possessed a closed shop contract, and the N.L.R.B., under the terms of the House amendment, could not order their reinstatement as the agreement would be a bar to the remedial order. Neither would the N.L.R.B. be able to require the company to cease recognizing the A.F.L. company-assisted union, since the contract, by its terms, requires such recognition. Even if the N.L.R.B. were to certify the C.I.O. affiliate on the basis of a representation election, the company could not be required to bargain with the majority union because the employer was compelled by contract to bargain with the A.F.L. union.

When the House proposed statute was considered by a Senate-House conference committee, the Senate members, to satisfy one of the objections of the N.L.R.B., amended the bill to require that notice of an existing contract between labor and management must be posted during the ninety-day challenge period.²⁹ Failure to post such a notice would render the contract vulnerable to N.L.R.B. remedial action.³⁰ Obviously the posting requirement was intended to prevent keeping a contract secret for the ninety-day period during which the employer can be charged with an unfair labor practice arising out of the agreement. Moreover, the notice must clearly direct any interested party to the location where the contract may be inspected. Finally any such agreement must be in a place easily "accessible" for inspection by employees or representatives of labor organizations. It should be noted that the provision requires the posting of an advertisement indicating the existence of a labor contract, and not the posting of the contract itself. Should an employer fail to post the notice, a contract executed by the employer with a labor organization would not constitute a bar to an N.L.R.B. proceeding in an unfair labor practice case stemming out of the contract. For example, if the employer and a company-dominated union involved in a closed shop contract failed to post the required notice, and if the employer discharged employees by virtue of the agreement, the amendment would not preclude the N.L.R.B. from directing the reinstatement of the discharged workers, regardless of the time at which the unfair labor practice charge was filed with the Board.

With the posting requirement added to the original House version, the amendment became law on July 12, 1943.³¹ It appears at once that the

²⁹ "N.L.R.B. Control Over Closed Shops Cut," *Labor Relations Reporter* (July 5, 1943), vol. 12, p. 670.

³⁰ National Labor Relations Board, *Eighth Annual Report* (1943), p. 6. The text of the Senate amendment follows: "Provided, that, hereafter, notice of such agreement shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person."

³¹ National Labor Relations Board Appropriation Act, 1944, Title IV, Act of July 12, 1943, chap. 221, Public Law 135, 78th Congress, 1st Session.

amendment sharply limits some customary N.L.R.B. activities. By its terms the N.L.R.B. is precluded from spending any of its funds to process a charge, filed ninety days subsequent to the execution of a labor contract, which alleges an unfair labor practice stemming from a collective bargaining agreement. A company-dominated union protected by a contract apparently would be immune to the normal N.L.R.B. disestablishment order. It would appear as though employees discharged by virtue of a closed shop contract executed by an employer with a company-dominated or assisted union, or with a minority union, could not be reinstated by the N.L.R.B. Furthermore an employer seemingly could not be ordered to bargain with a certified majority labor organization in the event he had executed a contract with a minority union or one company-dominated. By the amendment's terms the bargaining desires of the majority of the workers in a plant could be subjected to the minority group. Clearly the potential effect of the amendment would appear to limit seriously the remedial powers of the N.L.R.B. with the resultant impairment of some of the most fundamental principles of the National Labor Relations Act.

Beyond the potential limiting effect of the amendment on the customary operations of the N.L.R.B., the appropriation limitation is noteworthy for other reasons. In the first place, the provision constitutes the first Congressional limitation on the authority of the National Labor Relations Board since July 5, 1935, the date on which President Roosevelt approved the Wagner Act. Moreover, the amendment was not primarily adopted because of the insistence of an employer group, but through the efforts of the American Federation of Labor. It is extremely significant that the power of the N.L.R.B. was limited by Congress for the first time through the insistence of a major trade union group. Furthermore the appropriation limitation is noteworthy because it did not restrict the authority of the N.L.R.B. through an outright amendment to the Wagner Act. Rather Congress accomplished the objective by limiting the purposes for which the N.L.R.B. was permitted to spend its funds. Recognizing the difficulty of amending the Wagner Act in an outright manner, Congress and the A.F.L. reverted to an indirect method. The "appropriation rider" process of amending legislation has frequently been the device employed by Congress to realize its purposes when the lawmakers of the nation lack the ability to accomplish their objectives in a more direct manner. It is indeed significant that this was the method employed to limit the authority of the National Labor Relations Board.

Limitations on the Board

Though the effects of the amendment would seem apparent, many questions of interpretation were raised by its adoption. Notwithstanding the fears expressed by the N.L.R.B., does the amendment in reality

protect company-dominated unions? When does the three-month "challenge period" commence? Would a new three-month period begin after a contract enters its second year even though the agreement provides for its automatic renewal? Would the certification by the N.L.R.B. of a labor organization renew the three-month period? Ordinarily questions of interpretation of the Wagner Act are made by the N.L.R.B. with final determination by the courts. With respect to the appropriation limitation, however, such interpretations did not lie with the N.L.R.B., but with the Comptroller General of the United States. Legality of expenditures of public funds by governmental agencies is subject to review by the Comptroller General.³² The amendment's practical effect on the work of the National Labor Relations Board would, therefore, have to be decided by the Comptroller General. Recognizing this authority of the Comptroller General to decide any question of interpretation, the National Labor Relations Board on many occasions requested his construction of important questions involving the rider.³³ In the event of conflict of interpretations by the N.L.R.B. and the Comptroller General, the views of the Comptroller General would necessarily prevail. As onerous as the amendment appeared to the N.L.R.B., the agency stated that it would endeavor "to give full effect to the Congressional purposes in enacting the legislation," and, of course, would promptly and readily defer to the judgment of the Comptroller General.³⁴

On two early questions involving the interpretation of the amendment to the N.L.R.B. Appropriation Act of 1944, both the Comptroller General and the Board were in agreement. One question involved the immediate problem of whether the amendment precluded the N.L.R.B. from enforcing orders issued in cases in which it had already rendered decisions. In some instances employers will not immediately comply with N.L.R.B. orders, with the result of requiring the agency to obtain an enforcement decree from the federal courts. Moreover, employers at times even refuse to abide by a court order enforcing an N.L.R.B. ruling, and in such cases the Board must again petition the federal court for a contempt order.³⁵ In reconciling this question the Comptroller General ruled that the amendment did not preclude the Board from spending its funds with respect to obtaining enforcement orders in court proceedings in those cases in which the Board, prior to July 1, 1943, had already issued formal N.L.R.B. Decisions and Orders.³⁶ This decision, however, did not permit the N.L.R.B. to proceed with unfair labor practice cases, arising out of the

³² See Daniel T. Selko, *The Federal Financial System* (Brookings Institution, Washington, D.C., 1940), p. 379.

³³ National Labor Relations Board, *op. cit.*, p. 9.

³⁴ National Labor Relations Board, *Tenth Annual Report* (1945), p. 55.

³⁵ See National Labor Relations Act, 49 Stat. 449, Sec. 10(e).

³⁶ General Accounting Office, *Decisions of the Comptroller General of the United States*, Decision No. B-35803, dated July 29, 1943.

existence of a labor contract, which were at any lower stage of formal proceedings. Merely because a complaint was issued in a case, or because an Intermediate Report was rendered by an N.L.R.B. trial examiner, or because the Board itself was listening to additional evidence in a case, the N.L.R.B. could not, on the basis of the ruling of the Comptroller General, prosecute such cases to their ultimate conclusion. The Board immediately terminated the *Kaiser* cases because in these proceedings only a complaint was issued by the N.L.R.B.³⁷

An additional question involved the meaning of the term "complaint" as contained in the amendment. As used by the N.L.R.B., the term "complaint" means a formal notice issued by the N.L.R.B. or by its regional directors alleging that sufficient evidence exists to warrant formal proceedings in a case.³⁸ By issuing the complaint the N.L.R.B. merely in effect states that sufficient evidence exists which indicates that an employer has probably violated the Wagner Act. A formal hearing is held on the basis of the complaint, which may result in further formal proceedings, or disposition of the case at this point. On the other hand, the term "charge" as employed by the N.L.R.B. refers to the filing by an employee or a labor organization of a notice alleging that an employer has engaged in or is engaging in an unfair labor practice.³⁹ On the basis of the charge the N.L.R.B. will ordinarily conduct an informal investigation to determine whether in effect violation of the Wagner Act has occurred. In many instances the investigation will prove that the employer did not engage in unlawful conduct, and the charge is dismissed without any further proceedings in the case.⁴⁰ Moreover, the matter may be settled during the informal investigation by an employer's voluntary compliance with the Act. Approximately 90 per cent of all unfair labor practice cases instituted with the Board in the fiscal years 1936-1945 have been settled before institution of formal action.⁴¹ Such informal settlement of cases benefits all the parties to the proceedings, as it saves time and money for all concerned. Only when an employer will not comply with the Wagner Act when advised of a violation during the informal investigation will the N.L.R.B. issue a complaint. Only then does a case go to the formal stage of proceeding.

As noted, the appropriation amendment states that the N.L.R.B. is prohibited from using its funds in a "complaint case" originating from the execution of a labor contract which has been in existence for three months or longer "without complaint being filed." The question of inter-

³⁷ National Labor Relations Board, *Eighth Annual Report* (1943), p. 7.

³⁸ National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, July 12, 1944, p. 4.

³⁹ *Ibid.*, p. 3.

⁴⁰ For example, the Board, in the fiscal year 1945, dismissed 15.4 per cent of all charges filed with it. See National Labor Relations Board, *Tenth Annual Report* (1945), p. 84.

⁴¹ *Ibid.*, p. 12.

pretation then involved whether the amendment meant without a charge being filed with the N.L.R.B., or whether without a complaint being rendered by the N.L.R.B. If the Comptroller General ruled that the N.L.R.B. could not proceed with such cases unless it issued a complaint against an employer within three months from the date of the execution of a contract, the N.L.R.B. in many cases would find it impossible to investigate an employee's charge. This would mean that the N.L.R.B. at times would be compelled to issue charges almost indiscriminately. For example, assume that a contract was executed on January 1, and that an employee files a charge alleging a violation on March 30. Under these circumstances, the N.L.R.B., to avoid being precluded from ever assuming jurisdiction over the case, would be required to issue a complaint against the employer on the very same day the charge was filed. Obviously the N.L.R.B. could not conduct an investigation to determine the validity of the charge, nor attempt to arrange an informal settlement with the employer involved. Recognizing the significance of this problem the N.L.R.B. pointed out that to construe the amendment as meaning "without complaint being issued by the N.L.R.B." would place employers in the position of defending themselves against an unreasonable amount of complaints.⁴² Moreover, to adopt this view would mean that employers, employees, and the N.L.R.B. would be required to expend an unnecessary amount of time and money in disposing of cases. Such a construction would certainly impair the efficiency of the N.L.R.B. at a time when, due to the exigencies of the war, the Board desired to close both unfair labor practice and representation cases as rapidly as possible to prevent bargaining disputes from resulting in interruptions to war production. Favorable to the view of the N.L.R.B. the Comptroller General interpreted the amendment to mean that a charge must be filed by a labor organization or by an employee with the N.L.R.B. within three months from the date of execution of a contract, but that the rider placed no time limit within which a complaint may be issued by the Board.⁴³ Needless to mention the N.L.R.B. adopted a similar ruling in a formal interpretation of the amendment.

Company-Dominated Unions

On other vital issues of interpretation, however, the N.L.R.B. and the Comptroller General did not reach the same conclusion. One interpretation involved the question of whether the appropriation limitation protected contracts involving a company-dominated union. Though the N.L.R.B. feared that the limitation would protect company-dominated

⁴² "N.L.R.A. Amendment By Control of Purse," *Labor Relations Reporter* (June 21, 1943), vol. 12, p. 595.

⁴³ General Accounting Office, *op. cit.*, Decision No. B-35803, dated July 29, 1943.

unions when the legislation was being debated in Congress, the Board ruled in the first instance that the rider did not protect an employer engaging in unfair labor practices resulting from a contract involving a company-dominated union.⁴⁴ If the N.L.R.B. view prevailed, an employer could not legally discharge a worker because he refused to join a company-dominated union as a condition of employment. The N.L.R.B., under this interpretation, could, for example, order an employer to disestablish such an illegal union. Again an employer could be directed to bargain with an N.L.R.B. certified union, and may not hold a contract executed with a company-dominated union as a valid defense of his refusal to bargain. With such an interpretation, a major objection to the rider would be overcome. In establishing this position, Harry A. Millis, chairman of the N.L.R.B. at that time, declared that the contract executed by the employer with a company-dominated union is only an incident to the fundamental unlawful act committed by the employer. He stated that without a contract no question exists as to the power of the N.L.R.B. to order the disestablishment of the company-dominated union. The limitation of appropriation in no way affected the authority of the N.L.R.B. in this instance. Accordingly the execution of the contract did not immunize the illegal union because the agreement is "only an incident to the basic unlawful relationship [and] the employer is prohibited from recognizing the illegal organization."⁴⁵ In other words, the position of Millis was that a fundamental unlawful act could not be legalized by a contract, and the appropriation rider, not changing the substantive provisions of the National Labor Relations Act, could not declare as lawful that which is illegal under the basic provisions of the Wagner Act. If Congress had repealed outright the National Labor Relations Act to the extent of legalizing the company-dominated union whenever a contract existed, Millis's interpretation, of course, could not have been valid. In view of the fact, however, that the substantive provisions of the Act were not changed by the limitation, the interpretation by Millis appears reasonable.

This construction by the N.L.R.B., however, could hardly be supported by some of the testimony offered in Congress during the hearings on the provision. John Frey, President of the Metal Trades Department of the A.F.L., who was the leading proponent of the limitation, believed that the provision would not protect company-dominated unions. While offering testimony during the hearings, Frey declared that "company unions are illegal," and that the "rider would in no way interfere with the efforts of men, *members of company unions*, to have the right to select

⁴⁴ "N.L.R.B. Interprets Its Powers Over Contracts," *Labor Relations Reporter* (August 2, 1943), vol. 12, p. 805.

⁴⁵ "Protection for Dominated Unions," *Labor Relations Reporter* (November 1, 1943), vol. 13, p. 236.

a union of their own, to have the backing of the Board."⁴⁶ On the other hand Senator Wagner, author of the National Labor Relations Act, expressed the fear that the rider would protect company-dominated unions. He declared, "we passed the Labor Relations Act because we wanted to do away with company unions. No one objects to that, but what is proposed here will in effect authorize a company union."⁴⁷ Gerald D. Reilly, a former member of the N.L.R.B., held a view similar to that of Senator Wagner. He stated that "the purpose of the language of this amendment, however, goes much further than merely placing cases like the *Kaiser* cases beyond our jurisdiction. The language is so broad that it would prevent the Board from even setting aside yellow-dog contracts. It would legalize contracts with company-dominated unions."⁴⁸ Finally, the then Senator Harry Truman also declared that the rider would protect company-dominated unions.⁴⁹

Despite the opinions expressed in Congress, the Circuit Court of Appeals in Richmond upheld the view of the N.L.R.B. in respect to the inapplicability of the appropriation limitation to cases involving contracts with company-dominated unions.⁵⁰ The case involved the Baltimore Transit Company which petitioned the Court to stay the proceedings for the enforcement of an N.L.R.B. order for disestablishment of an inside union with which the company had executed a contract. The facts proved that the union was company-dominated, and the N.L.R.B. contended that the rider did not apply to an instance involving a dominated union. In line with the opinion expressed by Millis, the N.L.R.B. argued that in cases involving dominated unions, the existence of a contract is merely an incident to the ultimate illegal act of the employer. The contract was only an additional form of support granted by the employer. Beyond this argument the N.L.R.B. also contended that the use of funds expended by a public agency is subject to review only by the legislative branch of the government and did not constitute a proper issue for judicial determination and that a federal expenditure could not successfully be challenged by a litigant in the absence of a showing of direct injury not suffered by the public as a whole. It is noteworthy, however, that the court rendered its decision without opinion and as a consequence it cannot be determined on what basis the decision was reached.

Notwithstanding the decision of the court, and the position of the N.L.R.B., the Comptroller General of the United States subsequently ruled that the N.L.R.B. could not legally spend its funds to disestablish a company-dominated union protected by a contract unchallenged in the

⁴⁶ *Ibid*, p. 237. ⁴⁷ *Congressional Record* (July 2, 1943), vol. 89, p. 7030.

⁴⁸ *Hearings Before the Subcommittee of the Committee on Appropriations, United States Senate, 78th Congress* (1943), p. 304. ⁴⁹ "Protection for Dominated Unions," *op. cit.*, p. 237.

⁵⁰ *Labor Relations Reporter* (October 11, 1943), vol. 13, p. 165.

three-month period.⁵¹ To support his view the Comptroller General pointed to the legislative history of the act as noted above, and concluded that "to hold otherwise would be to read into the provision an exception which is not there and which, from the extensive discussion of the matter, would have been inserted in the law if it had been the intention of the Congress that such exception should be made."⁵² Nor could the N.L.R.B. disburse its money to prohibit an employer from engaging in other unfair labor practices which stem from such a contract. For example, the Comptroller General ruled the N.L.R.B. could not order the reinstatement of an employee discharged because of refusal to join a company-dominated union possessing a closed shop contract. In this vital respect the Comptroller General stated that "Congress intended that existing agreements shall remain in effect and not be the subject of inquiry in proceedings by the N.L.R.B. during the fiscal year 1944, regardless of the nature of the unfair labor practice that may be in issue in a particular case."⁵³ The effect of the Comptroller General's ruling meant in practice that a contract with a company-dominated union, beyond precluding the normal N.L.R.B. disestablishment order, would protect an employer in his refusal to bargain with a majority union; and that workers organized in an outside union, regardless of its majority status or N.L.R.B. certification, could not, in view of the existence of such a contract, receive statutory support to compel the employer to bargain with it. The appropriation limitation, as interpreted by the Comptroller General, offered an opportunity for employers to impair legitimate labor organizations by executing a closed shop contract with a company-dominated union and requiring all workers, as a condition of employment, to join the dominated union. During peacetime the outside union and its members could resort to its economic power to restrain such employer conduct. However, in view of labor's no-strike pledge during the war years, the amendment was particularly onerous. Under these conditions, legitimate labor unions had no recourse to the legal machinery of the N.L.R.B., nor could they strike in violation of their pledge.

Threatened with disintegration of their memberships by the effect of the appropriation limitation, some unions resorted to the National War Labor Board. Morally committed to its no-strike pledge, and blocked from recourse to the N.L.R.B. by the ruling of the Comptroller General, labor organizations sought relief from the N.W.L.B. Nevertheless, the hopes of the labor organizations in seeking this aid from the N.W.L.B. were not realized. In a case involving a minority (A.F.L.) union and a majority (C.I.O.) certified trade union, the N.W.L.B. refused to take

⁵¹ General Accounting Office, *op cit.*, Decision No. B-37051, dated October 21, 1943, vol. 23, p. 293. ⁵² *Ibid.*, p. 301. ⁵³ *Ibid.*, p. 300.

jurisdiction of the matter.⁵⁴ In this case the N.L.R.B. previously had ruled that a contract held by the A.F.L. union was no bar to a representation election.⁵⁵ As a result of the election, in which the C.I.O. union was victorious, the C.I.O. union was certified as the collective bargaining agent of the unit. Some time after the rider was enacted, the C.I.O. union petitioned the N.L.R.B. to order the company to bargain with the organization's representatives. However, in view of the appropriation limitation, the N.L.R.B. could take no action because the unfair labor practice charge was submitted by the C.I.O. affiliate more than three months after the execution of the A.F.L. contract. Here is an illustration which demonstrates clearly how the appropriation limitation impaired the principle of majority rule. It further shows that the certification process of the N.L.R.B. in such instances was rendered worthless.

The C.I.O. union, of course, could have taken the controversy to the area of industrial warfare, but probably refrained from this action because of labor's no-strike pledge. Instead it sought relief from the N.W.L.B. The C.I.O. union urged the N.W.L.B. to direct the employer to bargain with it on the grounds that the organization was designated as the bargaining agent by a majority of the workers in the plant. Ordinarily the N.W.L.B. would issue such a ruling, as in many cases the N.W.L.B. ordered employers to bargain with unions certified by the N.L.R.B.⁵⁶ However, the N.W.L.B. refused jurisdiction of this case because the Executive Order and the legislation from which it derived its powers prohibited that agency from rendering a decision not consistent with the policies of the N.L.R.B.⁵⁷ In denying the request of the C.I.O. affiliate, the N.W.L.B. declared that inasmuch as "the N.L.R.B. has found that it is precluded from acting by the 'rider' to its Appropriation Act, the War Labor Board consequently cannot do what Congress has directed the N.L.R.B. not to do."⁵⁸ One can readily understand the feeling of frustration of the majority union: (1) it represented the majority of the workers in the bargaining unit and was accordingly certified by the N.L.R.B.; (2) the employer refused to deal with the organization, claiming the contract he had executed with a minority union precluded such action; (3) the N.L.R.B. could not require the employer to bargain with the certified union because of the appropriation limitation; (4) the N.W.L.B. would not do what the N.L.R.B. could not do; and (5) the majority union

⁵⁴ *In re Basic Magnesium, Inc.*, 14 War Labor Reports 209 (1944).

⁵⁵ See General Accounting Office, *op cit.*, Decision No. B-44156, dated October 14, 1945. As the appropriation limitation referred only to complaint or unfair labor practice cases, the N.L.R.B., of course, was not restrained from proceeding with a representation case.

⁵⁶ See *infra*, chap. 7, for an analysis of the jurisdictional problem between the National War Labor Board and the National Labor Relations Board. In particular, see p. 142.

⁵⁷ Executive Order 9017, dated January 12, 1943. See also War Labor Disputes Act, 57 Stat. 163. ⁵⁸ *In re Basic Magnesium, Inc.*, *op. cit.*, p. 209.

could not morally strike to gain recognition because of labor's no-strike pledge. Such was the effect of the appropriation limitation.

Although the instant case pertains to a circumstance in which the limitation on the N.L.R.B. appropriation prohibited statutory guarantee of a majority union's right to recognition and collective bargaining, as a result of a contract involving a minority labor organization, the same set of conditions could easily be applied to a situation wherein a legitimate union loses legal protection of its right to collective bargaining because of an agreement executed with a company-dominated union. And such matters did arise after the ruling of the Comptroller General. In fact, in one of the early cases arising after the ruling of the Comptroller General with respect to the invulnerability of a company-dominated union contract, the N.L.R.B. was required to dismiss a charge submitted by an A.F.L. affiliate alleging that an inside union was company-dominated.⁵⁹ Even though an intermediate report issued by an N.L.R.B. trial examiner recommended the disestablishment of the company-dominated union, further remedial action by the N.L.R.B. was precluded by virtue of the A.F.L. sponsored appropriation rider. Thus, company-dominated unions, specifically declared unlawful under the Wagner Act, were protected from the remedial orders of the N.L.R.B.

The Three-Month Challenge Period

As noted above, the appropriation limitation provided only one escape for labor organizations or employees aggrieved by conduct of an employer who had executed an agreement with a company-dominated or minority union. The provision allows a three-month period wherein a charge can be filed alleging an unfair labor practice. Under the terms of the rider the N.L.R.B. was not precluded from its usual course of action when a charge alleging an unfair labor practice arising from a contract is filed with the N.L.R.B. within ninety days from the effective date of the agreement. A charge submitted to the N.L.R.B. in this period could be dealt with in the same manner as the N.L.R.B. customarily dealt with unfair labor practice charges. For example, if the N.L.R.B. found a union to be company-dominated, it could issue the normal disestablishment order notwithstanding a contract entered into by such union and an employer. On the other hand the contract would be a bar to an N.L.R.B. remedial order if the charge were filed after the three-month period. Congress in a sense admitted the inconsistency and anomalous nature of the limitation on the N.L.R.B. appropriation by providing for the three-month grace period. Acts which are illegal during the three-month period, and as such may be enjoined by the N.L.R.B., are in effect no longer unlawful after the ninetieth day. As a matter of logical consistency, an

⁵⁹ "Protection for Dominated Unions," *op. cit.*, p. 237.

act illegal before a certain date would appear equally unlawful subsequent to the critical date. This is especially true inasmuch as the appropriation amendment did not amend the substantive provisions of the Wagner Act. It merely declared that the N.L.R.B. could not spend its funds in certain situations after a certain period has elapsed, and no restriction was placed on the N.L.R.B. from disbursing its money for the same purpose before the ninetieth day. Thus the appropriation limitation appears to be an *ex post facto* law in reverse. It legalizes certain unlawful acts after a certain date.

Beyond the apparent logical inconsistency of the three-month escape period, one can question the real worth of its protective nature. Certainly an employer could refrain from creating any overt hostile acts against an outside union or against individual employees until the ninety-day period had elapsed. Assume that an outside union is led by a small but vigorous group of employees and that an employer enters into a closed shop agreement with a company-dominated union. Through a collusive arrangement between the illegal union and the employer, the leaders of the outside union are not compelled to join the company-dominated union until after the contract has been in existence for ninety days. After this period the employer requires the outside union leaders to join the company-dominated union. If they refuse, the company, under the terms of the closed shop contract, must discharge the outside union members. No recourse to the N.L.R.B. is possible because the three-month grace period had expired and the charge would be one arising over an "agreement between management and labor." Further, assume that the outside union members join the company-dominated union so as to retain their jobs. Still desirous of getting rid of these employees the company-dominated union and the employer could enter into another collusive arrangement whereby the workers are expelled from the company-dominated union on some fabricated charge. And as a consequence of their expulsion from the union the workers would be discharged from their jobs.

In another set of circumstances, as presented in the *Kaiser* cases,⁶⁰ the three-month challenge period would be ineffective in guaranteeing the majority workers their bargaining rights. As demonstrated in those cases, an employer of a new plant can execute a closed shop contract with a company-dominated union or with a favored nationally affiliated labor organization before any workers have been hired to operate the facility. After three months have elapsed from the date of execution of the contract, the employer could recruit workers, who as a condition of employment would all be required to join the inside union. No opportunity would be available for the workers to appeal to the N.L.R.B. Even though a

⁶⁰ See *supra*, n. 8 and 37.

majority of the recruited employees desired their own union, it would not be possible for them to obtain statutory protection in their bargaining rights. This situation could become particularly serious during depression years when the economic independence of workers is reduced to the minimum. Under these conditions the workers could be in fact economically compelled to join the company-favored union, and to that degree the legitimate labor movement would be retarded.

Another deficiency of the three-month challenge period involves contracts which were in existence at the time the appropriation amendment was enacted. The rider indicates that the three-month period with respect to such agreements did not begin concurrently with the enactment of the limitation. Instead a contract in existence for a period of longer than ninety days previous to the enactment date of the rider gave immunity to an employer's unfair labor practices engaged in prior to the effective date of the amendment. Such a situation was illustrated in the *Basic Magnesium* case discussed above.⁶¹ The company executed a contract with a minority union prior to the rider's enactment. When the majority union petitioned the N.L.R.B. for an order to direct the employer to bargain with the certified union, the Board was required to refuse jurisdiction of the case inasmuch as the company's contract was in existence for a period of three months before the charge was filed by the outside union. Included in the three-month period were the days during which the agreement was in effect before the enactment of the limitation.

Prompted by the shortcomings of the protection afforded by the three-month challenge period, the N.L.R.B., while pointing out its deficiencies, declared:

This single safeguard . . . has proved to be inadequate. This is chiefly because the illegal contractual relationship may have existed for a much longer period without occasion ever having arisen for attacking it, because the particularly discriminating or coercive act giving rise to a charge occurred long after the three month period had expired.⁶²

Despite the limited protection provided for by the three-month period, it affords the only remedy whereby employees and labor organizations may escape the appropriation limitation's restrictive terms. Accordingly it is vitally important to know exactly when the three-month period begins. Even a twenty-four-hour delay in filing a charge means that Wagner Act rights could be lost for affected employees or labor organizations.

Posting of Notices

Inasmuch as the appropriation limitation requires that a notice be posted during the ninety-day challenge period informing all interested parties that the employer involved has executed a contract with a labor organization, and that such contract is located "at an accessible place" and

⁶¹ See *supra*, n. 58.

⁶² National Labor Relations Board, *Eighth Annual Report* (1943), p. 9.

is open for inspection by any concerned individual, the N.L.R.B. ruled at once that the amendment was not operative unless compliance with the posting mandate was effected.⁶³ It will be remembered that the original House version of the amendment contained no such posting requirement and that it was embodied in the amendment only through the insistence of the Senate after the N.L.R.B. pointed out that failure to advertise a contract could cause most serious consequences through the expedient of keeping secret a contract for the ninety-day period. Consequently the N.L.R.B. insisted on literal compliance with the posting provision as was ultimately embodied in the amendment.

In one instance an employer executed a contract with a union which did not represent a majority of the employees within the bargaining unit. An outside union brought charges against the company alleging that the employer was dealing with a minority union. Though the outside union's charge was filed subsequent to the termination of the three-month challenge period, the N.L.R.B. assumed jurisdiction of the case because the employer failed to comply with the rider's posting requirement.⁶⁴ Instead of posting notices announcing the contract the employer distributed among his employees copies of the actual agreement. The N.L.R.B. ruled that the method employed by the company did not satisfy the posting mandate. In its decision the Board declared that it was "constrained to infer that not every employee, including both old and newly hired, received copies of the contract during any 3-month period prior to the filing of any charge in this proceeding."⁶⁵ A similar position was taken by the N.L.R.B. in a postwar case.⁶⁶ Rather than comply literally with the posting mandate, the employer mailed copies of the contract to his employees. The N.L.R.B. ruled that the device employed by the company did not constitute "posting" inasmuch as the mere mailing of the copies of the agreement to the workers did not indicate that the contract had been actually executed by the parties involved. The policy of the N.L.R.B. with respect to the posting mandate of the amendment indicates one of literal interpretation. No other device employed by a company will satisfy the provision. Accordingly the amendment is not operative, nor can the three-month challenge period be exhausted unless literal compliance is made with the posting requirement.

Termination of Old Contracts

In the event a contract between a labor organization and an employer terminates by its own terms after, for example, one year, the three-month challenge period begins anew.⁶⁷ Such a situation may be illustrated by a

⁶³ "N.L.R.B. Interprets Its Power Over Contracts," *op. cit.*, p. 805.

⁶⁴ *In the matter of Ken-Rad Tube and Lamp Corporation*, 62 N.L.R.B. 21 (1945).

⁶⁵ *Ibid.*, p. 24.

⁶⁶ *In the matter of Hall Freight Lines*, 65 N.L.R.B. 397 (1946)

⁶⁷ "New Rulings on N.L.R.B. Rider," *Labor Relations Reporter* (May 1, 1944), vol. 14, p. 251.

case in which the employer enters into a twelve-month contract with a company-dominated union. By its own terms the contract expires after one year. At the beginning of the new year the company executes another contract with the same dominated labor organization. An outside union files a charge against the employer after the execution of the second agreement and prior to the termination of the ninety-day period. Under such a set of facts the Comptroller General agreed with the N.L.R.B. that the agency could assume jurisdiction over such a case.⁶⁸

Automatic Renewal Clauses

If, however, a contract contains an automatic renewal clause, the Comptroller General ruled, contrary to the position of the N.L.R.B., that the three-month limitation period did not begin again after each successive renewal.⁶⁹ Some labor contracts provide for their automatic renewal from year to year unless one of the parties involved desires to terminate the agreement or modify it. For example, a contract may be executed on June 1 of one year and remain in force until May 31 of the next year, and from year to year after the end of the first year unless one of the parties gives written notice to the other for modification or termination at least thirty days prior to May 31. If a year elapses without such notice given by the parties involved, the contract could remain in effect for an indefinite period of time. The N.L.R.B. argued that the three-month challenge period provided for in the rider should begin again with each successive renewal of the contract. In the illustration above, an outside union, according to the Board, should have until September 1 of each year to file an unfair labor charge against an employer whose unlawful conduct sprang from the contract. The interpretation of the N.L.R.B., moreover, would give an annual opportunity for a majority union to gain statutory bargaining rights. Furthermore a company-dominated union, immune for twelve months, would be subject annually to the remedial powers of the N.L.R.B. However, the Comptroller General ruled the only three-month limitation period began immediately after the execution of the original contract and did not start over again with each successive renewal as provided for by an automatic renewal clause. To defend his ruling, the Comptroller General argued that such a contract "is one which, by the force of its provisions, is to be continued or extended indefinitely, so long as the notice of termination prescribed therein is not given."⁷⁰ By virtue of the Comptroller General's ruling in this matter, a company-dominated union or a minority union could be protected from the remedy available at law for an indefinite period of time.

⁶⁸ *Ibid.*, p. 252.

⁶⁹ General Accounting Office, *op. cit.*, Decision No. B-40648, dated April 20, 1944.

⁷⁰ "New Rulings on N.L.R.B. Rider," *op. cit.*, p. 254.

It appears by this time that the appropriation rider had serious implications apparently not contemplated by its proponents.

Substantive Changes in Labor Contracts

In a series of decisions, the N.L.R.B., with the approval of the Comptroller General, ruled that substantial modification of a contract that would otherwise have been renewed automatically started another three-month challenge period.⁷¹ The N.L.R.B. considered the alteration of important provisions of an existing contract, or the addition to it of substantive clauses, such as a closed shop, as grounds to renew again the period in which the contract could be attacked. In effect the N.L.R.B. considered such an altered contract to be a new one even though the agreement purports to renew itself automatically.

Such a set of circumstances was presented in a case involving a company-dominated union.⁷² A company and an employer-dominated union executed a contract in 1942, which was renewed in 1943. The company contended that the contract in question was a renewal of the previous 1942 contract, and as a consequence, the N.L.R.B. was precluded from the case because of the appropriation limitation. The N.L.R.B. rejected the view of the company, and pointed out that the new contract contained "substantive provisions with respect to terms and conditions of employment not found in the pre-existing contract."⁷³ The new contract altered or added provisions pertaining to conditions of work, wages, grievance machinery, extra pay for holiday work, and vacations with pay. Due to the fundamental changes in the contract when renewed, the N.L.R.B. ruled that the date of the renewal constituted the date from which any labor organization or employee could properly file a charge alleging an unfair labor practice. Moreover, any such charge could be acted upon by the N.L.R.B. in its normal manner. Consequently, the N.L.R.B. ordered the disestablishment of the company-dominated union.

Effect of Certification

Ordinarily a certification of a bargaining agent by the N.L.R.B. imposes the legal duty on an employer to recognize such a trade union as the exclusive bargaining agent of the designated unit. Such certification also provides the necessary prerequisite for an N.L.R.B. affirmative order directing a recalcitrant employer to bargain with the statutory representative. As demonstrated, however, the appropriation amendment operated as a bar to the authority of the N.L.R.B. to direct an employer to bargain with an N.L.R.B. certified union.⁷⁴ On the other hand, as the rider

⁷¹ "N.L.R.B. Interprets Its Power Over Contracts," *op. cit.*, p. 805.

⁷² *In the matter of Giffillan Bros., Inc.*, 53 N.L.R.B. 574 (1943).

⁷³ *Ibid.*, p. 575.

⁷⁴ *Supra*, *In re Basic Magnesium, Inc.*

referred only to complaint cases (unfair labor practice cases) springing from an agreement between management and labor, the N.L.R.B. took the position that nothing in the amendment prohibited the usual procedure of the Board in representation disputes. In other words, the N.L.R.B. could proceed in its customary manner to certify bargaining representatives, notwithstanding the appropriation limitation.⁷⁵ A contract in existence for a three-month period without complaint being filed does not preclude the N.L.R.B. from (1) entertaining a petition for certification; (2) investigating the merits of the petition; (3) holding a hearing; (4) conducting an election; and finally (5) certifying a labor organization as the exclusive bargaining agent for the unit found appropriate. This situation arose in a case involving a controversy between an A.F.L. union and a C.I.O. affiliate.⁷⁶ The A.F.L. union possessed a contract covering the employees of the company. Notwithstanding the contract, a C.I.O. affiliate petitioned the N.L.R.B. for an election to determine the bargaining agent of the firm. The Board rejected the contention of the company and the A.F.L. union that the rider precluded representation proceedings.⁷⁷ The N.L.R.B. pointed out that the contract involved had been in effect for a reasonable period of time; it was for an indefinite term; and was terminable upon the thirty-day notice of either party. Finally, the N.L.R.B. ruled that nothing contained in the appropriation limitation prohibited the bargaining election or even possible eventual certification of the C.I.O. union. In this connection, however, the N.L.R.B. pointed out that authority to determine the majority union notwithstanding the amendment, along with the lack of power to compel an employer to bargain with the certified union, could lead to "incongruous results."⁷⁸ Under such circumstances, an employer could with impunity bargain with the minority union, and thereby render worthless the N.L.R.B. certification of the majority union.

It is readily determined from the foregoing that the N.L.R.B. certification of a union does not renew the three-month limitation period when such certification occurs during the course of a contract. This fact was voluntarily recognized by the N.L.R.B. soon after the enactment of the rider.⁷⁹ A contract, for example, executed by an employer with a minority union on January 1, not challenged by April 1, does not become vulnerable after that date because of an N.L.R.B. certification of an outside union. Moreover, the N.L.R.B. voluntarily limited its jurisdiction over cases involving the following set of facts. Assume the N.L.R.B. certifies a

⁷⁵ National Labor Relations Board, *Eighth Annual Report* (1943), p. 8. See also General Accounting Office, *op. cit.*, Decision No. B-44156, dated October 14, 1945, in which the Comptroller General established a similar position.

⁷⁶ *In the matter of James D. Maloney*, doing business as Triangle Lake Lumber Company, 52 N.L.R.B. 27 (1943). ⁷⁷ *Ibid.*, p. 29.

⁷⁸ National Labor Relations Board, *op. cit.*, p. 8.

⁷⁹ "N.L.R.B. Interprets Its Powers Over Contracts," *op. cit.*, p. 805.

union. After such certification, the employer executes a contract with a company-dominated union. The certified union does not bring charges against the employer until after three months have elapsed from the date of execution of the contract. Such a charge is not timely submitted and the N.L.R.B. accordingly voluntarily limits its authority.⁸⁰ To satisfy the terms of the rider, a certified trade union in this situation should have filed a charge before the expiration of the ninety days commencing from the date of the execution of the contract involving the company-dominated union.

Unlike the preceding circumstances, the N.L.R.B. originally ruled that the three-month limitation period began once more when a certification was made by the N.L.R.B. of a labor organization at the time of the renewal of a contract.⁸¹ Even though a contract may provide for its own automatic renewal date, the N.L.R.B. contended that a representation proceeding occurring during the period of expiration and resulting in an eventual certification would begin the three-month period anew. For example, assume that a contract between an employer and a minority union runs year after year without change unless a party to the contract notifies the other party in writing of a proposed termination or modification at least thirty days before the anniversary date of the agreement. An outside union submits a petition for an election thirty-one days before the anniversary date of the contract, and the N.L.R.B. ultimately certifies the outside union. Under this set of circumstances, the N.L.R.B. believed that the three-month limitation period began anew from the date of certification. At any time during the ninety days after the certification date the outside union could properly file a charge with the National Labor Relations Board alleging that the employer was bargaining with an illegal labor organization. If the investigation substantiated the charge, the N.L.R.B. contended that a disestablishment order could be issued. Through such an interpretation of the amendment the N.L.R.B. desired to afford the annual opportunity to a legitimate trade union to challenge unlawful labor unions. In this manner the bargaining rights of a majority union would not be impaired for an indefinite period of time.

This view of the N.L.R.B., however, was struck down by an adverse Comptroller General ruling.⁸² In his view there existed only one legal three-month period and that began the day on which the original contract was executed. Regardless of any subsequent N.L.R.B. certification, the Comptroller General directed that a contract could not be attacked under the terms of the rider after the ninety days had elapsed. A majority

⁸⁰ "New Rulings on the N.L.R.B. Rider," *op. cit.*, p. 255.

⁸¹ "N.L.R.B. Interprets Its Powers Over Contracts," *op. cit.*, p. 806.

⁸² General Accounting Office, *op. cit.*, Decision No. B-40648, dated April 20, 1944.

union could not challenge the existence of a minority or company-dominated union subsequent to the initial ninety-day period notwithstanding an N.L.R.B. certification made during the renewal period of the contract. Once more the Comptroller General interpreted the amendment in a manner which seriously affected the principles of the Wagner Act. Behind the cloak of an illegal contract an employer could indefinitely engage in unlawful activities, and such an agreement would protect him from the remedial powers of the N.L.R.B.

The critical three-month limitation period, adopted ostensibly to protect legitimate trade union activities, was rendered largely impotent by rulings of the Comptroller General. Only when an employer executed a new contract or when an existing contract was substantially altered did the ninety-day period begin again. Automatic renewal of a contract precluded N.L.R.B. jurisdiction of an unfair labor practice case springing from the agreement. Finally, the effect of an N.L.R.B. certification issued after the initial ninety days did not renew the three-month period.

Effects of the Appropriation Limitation

Upon the enactment of the amendment, the N.L.R.B. was required to terminate at once many cases in which formal proceedings had taken place. Among these were the *Kaiser* cases, which motivated the passage of the amendment.⁸³ In all, the N.L.R.B. immediately terminated in whole or in part eleven cases in which formal hearings had taken place, including six in which N.L.R.B. trial examiners had issued intermediate reports.⁸⁴ Of the eleven cases, six involved unions which were alleged to be company-dominated, and in five cases the charging union contended that nationally affiliated organizations had received unlawful assistance from employers. Ten charges were filed by C.I.O. or A.F.L. affiliated unions, and one was submitted by a large independent union. In addition to the cases closed in the formal stage, the N.L.R.B. was required to terminate 45 cases in the informal stages of proceedings.⁸⁵ It is noteworthy that in one of the cases, a single employer discharged thirteen employees under the protection of the rider. In 36 cases, charges were filed alleging that employers were rendering unlawful assistance to labor organizations. In thirteen cases, of which some also contained charges of company-dominated or assisted unions, charges were brought against employers alleging that workers were discriminatorily discharged. Finally, in four of the cases, involving previously mentioned charges, it was also alleged that employers refused to bargain collectively and thereby violated the National Labor Relations Act. Of the 45 cases, 39 were filed by C.I.O. or A.F.L. unions, and six were submitted by unaffiliated unions or by individuals.

⁸³ See *supra*, *Kaiser Shipbuilding* cases.

⁸⁴ National Labor Relations Board, *Eighth Annual Report* (1943), p. 9.

⁸⁵ *Ibid.*, p. 10.

Such were the immediate effects of the amendment on the operation of the N.L.R.B.

During the entire fiscal year July 1, 1943, to June 30, 1944, the amendment precluded the N.L.R.B. from proceeding in 95 cases.⁸⁶ In 46 of these matters, the charges alleged company-dominated unions, and in 49 cases, the charges involved alleged illegal employer assistance to labor organizations. It is reported that in 52 of the 95 cases labor unions and employees further alleged that workers were discharged discriminatorily, and in thirteen of the cases it was also charged that employers had unlawfully refused to bargain collectively with majority unions. In view of this experience with the amendment, it is understandable why the N.L.R.B. declared that the amendment struck "at the heart of some of the basic principles of the National Labor Relations Act."⁸⁷

Amendment to the Appropriation Act of 1945

Required to husband the public money in accordance with the responsibilities of his office, the Comptroller General must of necessity permit expenditures from the public treasury only in conformance with the mandates of Congress. It is his unqualified duty to allow only those disbursements authorized by law. In the light of these facts, criticism leveled against the Comptroller General for his interpretations of the 1944 N.L.R.B. appropriation amendment is not altogether warranted. Nonetheless, the Comptroller General's interpretations of the 1944 amendment caused Congress to restudy the provision when it considered the N.L.R.B. appropriation for the fiscal year 1945.

Both the House⁸⁸ and the Senate⁸⁹ agreed that company-dominated unions should not be protected from N.L.R.B. remedial action by any new amendment. Similarly, both branches of Congress were of the opinion that a contract providing for its automatic renewal should not indefinitely protect unlawful acts of an employer. The effect of the ultimate adoption of these views would obviously modify considerably the restrictions placed on the N.L.R.B. by the 1944 amendment. On the other hand the House desired to include in the 1945 provision the requirement that only an employee or the employees of an employer could file charges under the amendment. This limitation would prohibit the N.L.R.B. from accepting a charge filed by a labor organization alleging that an employer had engaged in an unfair labor practice arising out of a contract which has not yet been in existence ninety days. In contrast to the House's position, the National Labor Relations Board has always permitted a

⁸⁶ National Labor Relations Board, *Ninth Annual Report* (1944), p. 5.

⁸⁷ National Labor Relations Board, *Eighth Annual Report* (1943), p. 9.

⁸⁸ "N.L.R.B. 'Contract' Powers: Easing of Limitations," *Labor Relations Reporter* (June 5, 1944), vol. 14, p. 409.

⁸⁹ "Senate Version of New N.L.R.B. 'Rider,'" *Labor Relations Reporter* (June 19, 1944), vol. 14, p. 481.

labor organization or an employee to file charges with the Board.⁹⁰ Quick to challenge the proposed House limitation the General Counsel of the Congress of Industrial Organizations pointed out that such a restriction would "subject employees . . . to reprisals by employers."⁹¹

Though the Senate recognized that Congress should exempt employer-dominated labor organizations from the protection of any new amendment, that body urged adoption of a measure which would protect any company-dominated labor organization possessing a contract executed before July 1, 1942.⁹² This amendment would forbid the N.L.R.B. to disestablish any company-dominated union which held a contract consummated before July 1, 1942. Moreover, the amendment would protect an employer's unlawful conduct arising from such an agreement. It would appear logically inconsistent to adopt a measure which would protect unlawful acts because of the selection of an arbitrary date.

When the 1945 N.L.R.B. Appropriation Act finally became law, the House requirement limiting the filing of charges under the amendment to employees was finally adopted, but the Senate proposal protecting company-dominated labor organizations holding contracts executed before July 1, 1942, was rejected. The 1945 appropriation limitation provided the following:

No part of the funds appropriated in this title shall be used in any way in connection with a complaint case arising over an agreement, or a renewal thereof, between management and labor which has been in existence for three months or longer without complaint being filed by an employee or employees of such plant: provided, that, hereafter, notice of such agreement, or renewal thereof shall have been posted in the plant affected for said period of three months, said notice containing information as to the location at an accessible place of such agreement where said agreement shall be open for inspection by any interested person: provided further, that these limitations shall not apply to agreements with labor organizations formed in violation of section 158, paragraph 2, title 29, United States Code, Section 8(2) of the National Labor Relations Act.⁹³

Close inspection of the new amendment will reveal that the 1945 version nullifies the two important interpretations rendered by the Comptroller General of the 1944 limitation. In the first place, and most significant, the N.L.R.B., under the terms of the new provision, is now empowered to order the disestablishment of a company-dominated union whether or not the organization possesses an unchallenged contract in

⁹⁰ National Labor Relations Board, *Rules and Regulations*, Series 1, as amended, April 27, 1936, p. 2. See also National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, July 12, 1944, p. 3.

⁹¹ "Senate Version of New N.L.R.B. 'Rider,'" *op. cit.*, p. 481.

⁹² *Ibid.*, p. 482.

⁹³ National Labor Relations Board Appropriation Act, 1945, Title IV, Act of June 28, 1944, chap. 302, Public Law 373, 78th Congress, 2nd Session. Similar laws were enacted for the fiscal years 1946 and 1947. See National Labor Relations Board Appropriation Act, 1946, Title IV, Act of July 3, 1945, chap. 263, Public Law 124, 79th Congress, 1st Session; and National Labor Relations Board Appropriation Act, 1947, Title IV, Act of July 26, 1946, Public Law 549, 79th Congress, 2nd Session.

existence for three months or longer. Furthermore, the N.L.R.B. is not precluded by such a contract from directing an employer to cease engaging in unfair labor practices which stem from the agreement. As before the enactment of the 1944 rider, the N.L.R.B. now has the power to order the reinstatement of workers discharged by virtue of the terms of a closed shop contract executed by an employer and a company-dominated union. Legitimate unions are no longer subjected to the rule of a company-dominated union. In this respect an employer no longer can point to an agreement consummated with a company-dominated union as a valid defense for his refusal to bargain with an N.L.R.B. certified labor organization.

In the second place, the new amendment no longer will protect indefinitely an unlawful contract providing for its own automatic renewal. As noted before, the Comptroller General, while interpreting the 1944 amendment, ruled that such an agreement could be challenged only once in the three-month period immediately following its execution. Subsequent annual renewals of such a contract did not provide a new ninety-day period in which employees could file a charge with the N.L.R.B. alleging an employer unfair labor practice. As demonstrated, the Comptroller General's construction of the 1944 provision could have protected illegal unions and unlawful employer conduct from the N.L.R.B. remedial powers for an indefinite period of time. Under the new provision the N.L.R.B. points out that employees have the opportunity "to attack the validity of agreements which have been automatically renewed from year to year, provided that the charge is filed within 3 months after the renewal date."⁹⁴ A contract executed with a minority union which provides for its annual automatic renewal can be challenged each year by the employees affiliated with an outside union. However, the charge must be filed with the N.L.R.B. within ninety days after the renewal date. With respect to minority union contracts which run for a protracted period, say five years, it would appear that economic forces would eventually effect a change in the agreement's substantive terms. As noted before, once the conditions of a contract are altered, the three-month limitation period is renewed.⁹⁵ A wage change effected at the end of two years would reopen the three-month challenge period, even though the contract establishing the original wage rate was executed for a five-year period. Of course, this would be small comfort to the workers of a majority union who must be subjected to the dominance of a minority union until economic forces effect a change in a contract's terms.

⁹⁴ National Labor Relations Board, *Ninth Annual Report* (1944), p. 6.

⁹⁵ *Supra*, In the matter of *Gulfilan Brothers, Inc*. See *infra*, p. 61. The 1948 version of the appropriation limitation removes minority unions from its protection.

Diverse Interpretations of the 1945 Amendment

An immediate question faced the N.L.R.B. after the enactment of the new appropriation amendment. This problem was whether or not the Board could properly assume jurisdiction of a case under the terms of the 1945 rider despite the fact that the 1944 amendment placed the same case beyond the scope of the N.L.R.B. jurisdiction.⁹⁶ In a case involving this problem the N.L.R.B. originally issued a decision citing employer unfair labor practices which sprang from a contract executed between an employer and a company-dominated union. Subsequent to this decision, however, the Comptroller General, as noted, ruled that the 1944 rider protected such activities from the N.L.R.B. remedial powers. Then in 1945, after the new amendment was passed, the Board reaffirmed its ruling issued in 1944. In this connection the Board rejected the employer's contention that the 1944 amendment substantively amended the Wagner Act for that year. The position of the employer was that the original limitation amended the Wagner Act permanently for the year 1944, and that any unfair labor practices committed in 1944 under protection of that year's amendment were permanently immune from remedial N.L.R.B. action. In refusing to accept the employer's position, the N.L.R.B. declared that the 1944 limitation did not "constitute substantive amendments to the National Labor Relations Act; they merely control the supply of Board funds and the purposes for which they may be used during the fiscal period involved."⁹⁷

In a typical case involving a company-dominated labor organization possessing a contract in existence longer than three months without a charge being filed, the N.L.R.B. utilized the provisions of the new amendment to order the disestablishment of the union.⁹⁸ Investigation revealed that a company urged employees to join an inside union, permitted workers to attend to union affairs on company time without loss of pay, and instructed its supervisory employees to distribute membership cards and to solicit signatures at the plant during working hours. Shortly after the inside union was organized, the company granted it an exclusive recognition contract. The company contended that the contract was a bar to the processing of the unfair labor practice charge instituted by an outside union. In rejecting the company's claim, the Board pointed out that the employer's immunity expired on June 30, 1944, the date of the termination of the 1944 amendment. Consequently the contract did not preclude N.L.R.B. action. The Board directed the inside union disestablished, ordered the employer to cease recognizing the union as the representative of any of his employees, and to cease giving effect to the contract executed

⁹⁶ *In the matter of S. H. Camp & Company* (Supplemental Decisions and Amended Orders), 61 N.L.R.B. 432 (1945). ⁹⁷ *Ibid.*, p. 435.

⁹⁸ *In the matter of Kinner Motors, Inc.*, 57 N.L.R.B. 622 (1944).

with the company-dominated union.⁹⁹ Such remedial action was, of course, precluded by the terms of the 1944 appropriation limitation, but the Board's funds, by virtue of the 1945 provision, were available for the affirmative action taken in the instant case.

As in 1944, the Comptroller General had occasion to render interpretations involving the 1945 amendment. Unlike his 1944 interpretations which greatly increased the scope of the original rider's application, the Comptroller General issued rulings concerning the 1945 limitation which restricted its effect on the operations of the N.L.R.B. As noted above, the new rider, in contrast to the 1944 version, provides that charges filed under its terms must be instituted by an employee or employees of an employer. It does not mention whether a labor organization has the right to file such a complaint, even though the N.L.R.B. has always permitted a labor organization to file charges under the terms of the Wagner Act.¹⁰⁰ A ruling by the Comptroller General which would have prohibited labor organizations from filing complaints under the terms of the appropriation rider might have fostered reprisals against individual employees. Whereas a complaint instituted by a trade union alleging, for example, company domination of a union, cannot be traced to any individual worker, a charge filed by an individual worker might subject that employee to acts of retaliation.

Sustaining the Board's position, the Comptroller General ruled that a labor organization could be designated by employees to act for them in filing charges under the terms of the 1945 amendment.¹⁰¹ In rendering his decision, the Comptroller General pointed out that since

... the rider does not expressly require that the charge be filed by an employee personally and as its legislative history discloses nothing to indicate a Congressional intent to preclude the delegation to an agent of the right to file charges ... the requirements of the rider have been met ... where it is plain that the employees of the plant have expressed their dissatisfaction with the existing contract by authorizing the union to file a charge on their behalf.¹⁰²

Prerequisite to the right of a labor organization to file a complaint, however, the Comptroller General ruled that the union filing such a charge must possess members among the workers of the plant affected by the contract.

Both the N.L.R.B.¹⁰³ and the Comptroller General¹⁰⁴ rejected an employer's contention that the new amendment relieved him of his responsibility of posting a notice under terms of the 1944 amendment. Evidence proved that the employer involved in a case did not comply with the post-

⁹⁹ *Ibid.*, p. 625.

¹⁰⁰ National Labor Relations Board, *Rules and Regulations*, Series 3, as amended (July 12, 1944), p. 3.

¹⁰¹ General Accounting Office, *op. cit.*, Decision No. B-47778, dated March 14, 1945.

¹⁰² *Ibid.*, p. 6.

¹⁰³ See *supra*, *In the matter of Ken-Rad Tube and Lamp Corporation*.

¹⁰⁴ General Accounting Office, *op. cit.*, Decision No. B-47778, dated March 14, 1945.

ing mandate of the 1944 amendment. Charges were subsequently instituted against the employer under terms of the new rider. As defense to the charge the employer contended the word "hereafter" as contained in the 1945 amendment relieved him of the responsibility of posting notices under the terms of the 1944 amendment. He believed that since the 1945 rider supplanted the old version, it was only required to post notices under the terms of the new provision relating to contracts executed during the 1945 fiscal year. However, the Comptroller General rejected such a literal interpretation of the word "hereafter." He stated in this connection that "a strictly literal interpretation of the word 'hereafter' [as used in the 1945 amendment] would produce an unjust and absurd result at variance with the primary purposes of the riders [both those of 1944 and 1945] as a whole."¹⁰⁵ Consequently, the Comptroller General ruled that "hereafter" is used in the 1945 rider in the same sense as it was used in the 1944 rider and is retroactive to July 1, 1943, the effective date of the 1944 rider. An employer who did not post a notice as required by the 1944 amendment is not relieved of such duty by the enactment of the 1945 rider.

Though the amendments to the N.L.R.B. Appropriation Acts do not literally require a contract to be written, the Comptroller General nevertheless ruled that an oral agreement between a union and an employer does not render the employer immune from the Board's remedial action.¹⁰⁶ A contract must be reduced to writing before the rider's limitations become operative. In a case involving an oral agreement, the Board accordingly ruled that the appropriation amendment did not apply. Rejecting the employer's contrary contention the N.L.R.B. declared that inasmuch as "there being no written agreement in existence, no question arises with respect to the limitations imposed by the Appropriations Act. We conclude that . . . the Appropriations Act is not a bar to the instant proceeding."¹⁰⁷

Conclusions

The provisions of the 1945 rider compared to those of the 1944 version were not as restrictive on the operations of the N.L.R.B. Company-dominated unions were no longer immune from the Board's remedial powers. Neither could employers take refuge behind a contract with a company-dominated union to defend unlawful acts springing from such an agreement. A contract providing for its automatic renewal, furthermore, could not place an employer permanently beyond the jurisdiction of the N.L.R.B. By virtue of a Comptroller General's interpretation, labor or-

¹⁰⁵ *In the matter of Ken-Rad Tube and Lamp Corporation, op. cit.*, p. 23.

¹⁰⁶ General Accounting Office, *op. cit.*, Decision No. B-43670, dated August 24, 1944.

¹⁰⁷ *In the matter of Briggs Manufacturing Company*, 58 N.L.R.B. (1944), 72, 75.

ganizations as well as employees could file complaints under the provisions of the 1945 amendment. Moreover, the N.L.R.B. has ruled that an employer protected by a contract may not discriminate against employees in a manner not required by the agreement.¹⁰⁸ Thus, an employer may not discharge an employee for union activities rendered on behalf of an outside union notwithstanding a contract with an inside union.

When squared with the basic principles of the National Labor Relations Act, however, the 1945 amendment was still subject to question. In this connection the N.L.R.B. pointed out that the rider continued to provide "a cloak for a variety of unlawful conduct which would otherwise be subject to the remedial processes of the Act."¹⁰⁹ Specifically, the N.L.R.B. under the terms of the limitation was precluded from ordering the reinstatement of workers discharged pursuant to a contract executed with a minority union. The limitation also encouraged the abuse of closed shop contracts. Nothing in the Wagner Act precluded an employer from executing a contract with a labor organization and requiring the membership therein of all employees as a condition of employment, provided that such a union represented a majority of the workers in the bargaining unit.¹¹⁰ Contrary to the democratic principle of majority rule, however, the N.L.R.B. under the terms of the 1945 appropriation limitation could not order the reinstatement of employees discharged by virtue of an agreement executed with a minority union. Moreover, the amendment offended the principle of majority rule by protecting an employer who bargained with a minority union. In this manner the practical effect of an N.L.R.B. certification could be rendered worthless. Under these circumstances, a majority union, unable to utilize the peaceful machinery of the N.L.R.B., might have resorted to industrial warfare to implement the principle of majority rule. It appeared, therefore, that the 1945 appropriation limitation violated one of the most basic principles of the Wagner Act—the elimination of strikes caused by employers' refusal to recognize and bargain collectively with unions freely chosen by the majority of their employees.

Aware of these objections to the 1945 version of the amendment to the appropriation acts of the N.L.R.B., Congress removed minority unions from the protection of the limitation when it passed the N.L.R.B. Appropriation Act for the fiscal year 1948.¹¹¹ Contracts executed with company-dominated unions or with minority labor organizations, therefore, can no longer serve to prevent the operation of the National Labor Relations Board.

¹⁰⁸ *In the matter of Greenville Steel Car Company*, 54 N.L.R.B. 608 (1944).

¹⁰⁹ National Labor Relations Board, *Ninth Annual Report* (1944), p. 6.

¹¹⁰ National Labor Relations Act, Sec. 8(3).

¹¹¹ National Labor Relations Board Appropriation Act, 1948, Title III, Act of July 8, 1947, Public Law 165, 80th Congress, 1st Session.

Chapter 3

PROBLEMS UNDER THE WAR LABOR DISPUTES ACT

Development of the War Labor Disputes Act

Distressed by the coal strikes which swept the nation during the early months of 1943, Congress endeavored to limit or reduce them through the enactment of restrictive legislation. Senator Connally of Texas introduced a bill in the Senate early in May, 1943, which was recognized as a measure designed to end the coal strikes.¹ "The Connally bill was passed with the obvious purpose of meeting the situation which might arise should the [coal] strike be resumed."² Specifically, the Senate measure conferred upon the President the right to seize any plant or facility in which a labor disturbance or a strike interrupted war production.³ It provided for governmental operation of the seized facility under the same working conditions which existed before the seizure. Under the bill's terms any person instigating or encouraging a strike in a plant seized by the government was made liable to a fine of \$5000 and one year imprisonment. To provide the National War Labor Board⁴ with the necessary power to compel the attendance of witnesses at its hearings, the Senate bill in addition would give the agency the power of subpoena. This provision was included because the officers of the United Mine Workers of America were boycotting War Labor Board coal strike hearings. Finally the proposed Senate law provided for court review of decisions of the National War Labor Board, insofar as the Board's rulings related to matters of law. In short, the Senate measure made it a criminal offense to resume the coal strike, and, in effect, required attendance of representatives of the United Mine Workers at the War Labor Board coal strike hearings.

Unlike the Senate version, the House proposed legislation which not only included most all the provisions of the Senate measure, but also provided for the general regulation of labor organizations.⁵ Specifically, the house measure, beyond embodying the Senate provisions, outlawed strikes in war plants except on thirty days' notice and provided for strike votes; required labor unions to register with the N.L.R.B. and to file with the agency data pertaining to any financial contributions made to

¹ At the time the Senate was considering the measure, the government had already seized the mines and a "truce" was declared in the coal strike.

² "Government Musters Forces in Coal Dispute," *Labor Relations Reporter*, May 10, 1943, vol. 12, p. 377.

³ Such authority the President, of course, already possessed as a function of his war powers.

⁴ Created by Executive Order 9017, dated January 12, 1942, to settle finally any labor disputes which threatened to interrupt war production. See *infra* chap. 7 for an analysis of the general operations of the National War Labor Board.

⁵ "House Version of Anti-Strike Measure," *Labor Relations Reporter*, June 7, 1943, vol. 12, p. 524.

political campaigns; and provided a general statutory basis for the operations of the National War Labor Board. The House measure went much further than the Senate bill which was proposed merely to deal with the coal strike.

Provisions of the Act

When the law finally reached the President's desk in June, 1943, the measure, as eventually passed by both houses of Congress, contained essentially all of the provisions proposed by the House.⁶ In short, the legislation gave statutory authority to the President to seize war facilities; provided that conditions of employment existing at the time of the seizure of a plant remain undisturbed unless later changed by the National War Labor Board; made it a criminal offense to instigate, direct, or aid a strike in a government-seized plant; gave the National War Labor Board statutory authority and defined its powers; prohibited labor organizations from contributing funds for political purposes; and finally outlawed strikes in privately operated war plants unless and until thirty-day strike notices had been filed and a strike vote taken to indicate the strike desires of war workers.

Both William Green, President of the American Federation of Labor, and Phillip Murray, President of the Congress of Industrial Organizations, condemned the legislation in a vigorous manner. Green stated that "the Congress of the United States rendered . . . a great disservice when it passed the Connally-Smith bill. This disservice will be reflected in the lowered morale of working men and women, in the development of widespread discontent, and in the impairment of efficiency."⁷ Murray declared that it was the "judgment of the Congress of Industrial Organizations that this proposed legislation, if enacted into law, would constitute one of the most serious blows directed against our national war effort and be the equivalent of a major military disaster. The C.I.O. and its affiliated organizations have given their pledge to the nation that there shall be no stoppages of work for the duration of the war. [The War Labor Disputes Act] on the other hand, will actually encourage stoppages and interruptions of work."

President Roosevelt gave great weight to labor's wartime no-strike pledge when he considered the legislation. In fact the President vetoed the War Labor Disputes Act on the ground that labor had kept its no-strike pledge, and that the law would encourage strikes rather than prevent them. On this point the President declared, "American labor as well as American business gave their 'no-strike, no-lockout' pledge after the

⁶ Millis and Montgomery, *Organized Labor* (McGraw-Hill, New York, 1945), p. 599.

⁷ "Text of 'War Labor Disputes Act,'" *Labor Relations Reporter*, June 21, 1943, vol. 12, p. 599.

attack on Pearl Harbor. That pledge has been well kept except in the case of the leaders of the United Mine Workers. For the entire year of 1942, the time lost by strikes averaged only 5/100ths of one per cent of the total man hours worked. The American people should realize that fact — that 99 and 95/100 per cent of the work went forward without strikes and that only 5/100ths of one per cent of the work was delayed by strikes. That record has never before been equalled in this country.”⁸ Accordingly the President implied that the War Labor Disputes Act failed to recognize this adherence of labor to its no-strike pledge. In addition, he stated the measure would stimulate labor unrest and give apparent government sanction to wartime strikes by following the procedure of this bill. As for the thirty-day “waiting period,” the President declared such a period “might well become a boiling period instead of a cooling period.”⁹ Finally the President maintained that the law was not necessary and ill-advised because of labor’s adherence to its no-strike pledge, and because the bill was a potential source of industrial strife. As a result of these considerations the President vetoed the measure and returned it to Congress. Notwithstanding the views of the President, however, Congress enacted the War Labor Disputes Act over the President’s veto and the measure became the law of the land on June 25, 1943.¹⁰

Strike Elections Under the Act

Under the terms of the War Labor Disputes Act no strike could lawfully take place in privately owned war industries unless the representatives of the employees involved in the labor dispute filed a strike-notice. When a labor controversy developed which threatened to interrupt war production, the representative of the employees was required to give notice of the dispute together with a statement of the issues of the controversy to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board.¹¹ For not less than thirty days after notice of the dispute was filed, the employer and the employees involved were required to continue production without interruption. Finally, on the thirtieth day after the notice was filed, the National Labor Relations Board was directed to take a secret ballot among the employees involved in the dispute to determine whether the workers desired to permit any interruption of war production.¹²

⁸ “Passage of War Labor Disputes Act,” *Labor Relations Reporter*, June 28, 1943, vol. 12, p. 632. ⁹ *Ibid.*, p. 648.

¹⁰ War Labor Disputes Act, 57 Stat. 163, 78th Congress, 1st Session.

¹¹ *Ibid.*, Sec. 8(a)(2). ¹² *Ibid.*, Sec. 8(a)(3). Specifically, the text of the statute in this respect provided that: “On the thirtieth day after notice . . . is given by the representative of the employees, unless such dispute has been settled, the N.L.R.B. shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit, bargaining units, on the question whether they will permit any such interruption of war production. The National Labor Relations Board shall include on the ballot a concise statement of the major issues involved in the dispute and of the efforts being utilized for the settlement of such dispute. The N.L.R.B. shall by order forthwith certify the results of such balloting, and such results be open to public inspection.”

By providing employees involved in a dispute with the "opportunity to express themselves, free from restraint or coercion, as to whether they will permit such interruptions in wartime,"¹³ it was believed that the workers would reject any such proposal to strike. In this connection, Representative Harness, of Indiana, declared, "you will never convince me that when you say to American labor, 'you can have a secret ballot to determine whether you are going to strike' they will vote to strike."¹⁴

Beyond charging the N.L.R.B. with the duty of taking the strike vote, the War Labor Disputes Act required the Board to certify the results of the election to the public and to the President.¹⁵ In addition to these two duties, the Board was to receive the notice of the dispute and provide a ballot indicating the issues involved and the steps being taken to solve the dispute. It is clear, of course, that the duties imposed on the N.L.R.B. by the War Labor Disputes Act bore little resemblance to its usual responsibilities. Nonetheless Congress, desiring to poll war workers on the issue of their intention to strike, selected the N.L.R.B. to implement the policy because of the Board's extensive election experience developed over an eight-year period.

Notwithstanding these additional duties, the N.L.R.B. immediately began the discharge of its new legal obligations. Many questions of interpretation had to be reconciled before strike elections could be conducted. For example, who constituted the employees' representative? When is a notice filed? Who may vote in a strike election? Apart from such administrative issues, the N.L.R.B. was confronted with substantive problems arising out of the War Labor Disputes Act. In this connection the N.L.R.B. was required to reconcile the question of the effect of a favorable strike vote on its authority to certify labor organizations for purposes of collective bargaining; to determine the validity of the provisions of the National Labor Relations Act for workers who struck in violation of the War Labor Disputes Act; and to decide the degree of applicability of the Wagner Act to plants seized by the government under the authority of the War Labor Disputes Act.

Problems of Administration

As noted, no labor organization was permitted to call or authorize a strike in any privately operated war facility without first filing a notice of the dispute with the Secretary of Labor, the National Labor Relations Board, and the National War Labor Board.¹⁶ Moreover, the statutory thirty-day "waiting period" did not begin until the notice was properly

¹³ *Ibid.*, Sec. 8(a). ¹⁴ *Congressional Record*, June 3, 1943, vol. 89, p. 5392.

¹⁵ War Labor Disputes Act, Sec. 8.

¹⁶ Sec. 8(a)(1) of the War Labor Disputes Act states that "the representative of the employees of a war contractor shall give to the Secretary of Labor, the N.W.L.B., the N.L.R.B., notice of any such labor disputes involving such contracts and employees, together with a statement of the issues giving rise thereto."

filed. In a joint declaration, all three agencies involved interpreted the strike-notice provision to mean that no notice was effectively filed until all three agencies had been served. To consolidate all notices, a central docket was set up in the office of the Department of Labor. In accordance with this policy, the effective date of filing of the notice constituted the date on which the last agency was served. The thirty-day "waiting period" began only when the last agency received notice of the dispute. Finally, no notice was properly filed unless it contained a factual statement of the issues in the dispute.¹⁷ Implementing the policy adopted by the three agencies, the Regional War Labor Board at Cleveland ruled that a notice was not properly served under the terms of the War Labor Disputes Act when it was merely forwarded to a Regional War Labor Board. Similarly, the Cleveland Regional Board declared that the thirty-day waiting period did not begin until the notice was filed in the Washington offices of all three agencies.¹⁸ In practice strike-notices were filed in the form of telegrams, letters, and carefully executed affidavits.

No less important than the question of what constituted proper filing of the strike-notice was the issue of who may submit such notices. Inasmuch as the War Labor Disputes Act declared that "the representative of the employees" shall file such notice, a construction of the term "representative" had to be made. One prevailing interpretation of the term was based on the meaning of "representatives" as utilized in the National Labor Relations Act. Under the terms of the Wagner Act, a statutory representative for the purposes of collective bargaining must represent at least a majority of the workers within the appropriate bargaining unit.¹⁹ Such an interpretation applied to the War Labor Disputes Act would mean that only a representative speaking for a majority of employees within an appropriate unit would be permitted to submit strike-notices. On the other hand, it was conceivable that a dispute involving a minority group of employees might also have threatened to interrupt war production. In view of this fact it may be argued that representatives of minority groups should also have been permitted to file strike-notices.

This problem received the attention of President Roosevelt and an interpretation of the term was requested by the Chief Executive of the Attorney General of the United States. Shortly after the President's request, the Attorney General construed the term "representatives" as contained in the War Labor Disputes Act to apply equally to the agents of minority groups of employees as well as to the representatives of majority groups. In this connection the Attorney General declared that "labor

¹⁷ National Labor Relations Board, *Eighth Annual Report* (1943), p. 75.

¹⁸ "Strike Notices Under War Disputes Act," *Labor Relations Reporter*, Aug. 2, 1943, vol. 12, p. 807.

¹⁹ National Labor Relations Act, 49 Stat. 449, Sec. 9(a).

disputes threatening seriously to interrupt war production might arise with groups of employees other than those comprising an appropriate bargaining unit. Therefore, the purpose of Section 8 [of War Labor Disputes Act] might be defeated if no representative other than a representative of a majority of employees in an appropriate bargaining unit could give the notice provided for in Section 8."²⁰ As a result of the Attorney General's ruling, the N.L.R.B. accepted strike-notices and conducted strike elections among employees without reference to the appropriateness of the unit, without regard to the majority status of the employees involved in a dispute, and without attention to whether a certified union existed in the war plant.²¹ In effect any representative of any group of employees was permitted to file strike-notices under the terms of the War Labor Disputes Act.

Apparently Congress desired this interpretation of the strike-vote provision inasmuch as that body rejected an amendment proposed by the committee in charge of the War Labor Disputes Act which would have given statutory authority for the contrary view. This proposed amendment would have precluded any union from filing a strike-notice if the N.L.R.B. had previously rejected a petition from the union for a collective bargaining election, either because the unit proposed was not appropriate, or because the union failed to submit evidence to the Board which indicated that the organization represented a substantial number of employees within a plant.²² Of course the rejected amendment would have prohibited the filing of a notice by any other than a majority labor organization.

When a strike-notice was submitted, the N.L.R.B. accepted such a notice as conclusive evidence that a dispute had arisen within the terms of the War Labor Disputes Act. In one instance the Southern Coal Producer's Association took the position that the Board should take no action until it instituted an investigation to determine whether a dispute existed.²³ Rejecting the employer's contention, the Board ruled that the strike-notice itself was sufficient to indicate the existence of a labor dispute. Conversely, the N.L.R.B. immediately ceased all activities in a case upon the withdrawal of a dispute-notice.²⁴

As the N.L.R.B. was limited in its strike-vote activities to elections among employees of a "war contractor," the interpretation of this term was also necessary. Under the terms of the War Labor Disputes Act, a war contractor included any person engaged in economic activities under

²⁰ "N.L.R.B. Begins Its Strike Vote Duties," *Labor Relations Reporter*, August 9, 1943, vol. 12, p. 843. ²¹ National Labor Relations Board, *op. cit.*, p. 76.

²² *Congressional Record*, June 3, 1943, vol. 89, p. 5324.

²³ "N.L.R.B. Strike Ballots 'Dispute' Assumed," *Labor Relations Reporter*, March 19, 1945, vol. 16, p. 82. ²⁴ National Labor Relations Board, *Eighth Annual Report* (1943), p. 78.

contractual relationship with the War Department, Navy Department, the U. S. Maritime Commission, or with any agency involved in the Lend-Lease Act. In addition, the term also included any person whose plant or facility was equipped for the production of any goods vital to the war effort, or whose firm was actually producing equipment necessary to the war effort regardless of a contractual relationship with any governmental agency.²⁵ To determine who was a "war contractor" in any particular case, the Act conferred the authority of interpretation upon the President of the United States, who in turn delegated the task to the Secretary of Labor.²⁶ Experience proved that such determinations were often a necessary prerequisite to an N.L.R.B. strike-vote election inasmuch as the N.L.R.B. rejected seventy-five cases in the fiscal year 1944²⁷ and thirteen cases in the fiscal year 1945²⁸ because the employer involved was not a "war contractor" within the meaning of the War Labor Disputes Act.

Similar to the problem of determining in each case the appropriate unit for collective bargaining, the Board, under the terms of the War Labor Disputes Act, was also compelled to designate which employees were eligible to vote in strike elections. To solve this problem, the Board utilized principles established under the Wagner Act. Where an appropriate bargaining unit had already been established by the N.L.R.B., the Board polled the workers contained in such unit. However, where no collective bargaining unit had been designated, the Board was required to determine the "unit appropriate" for the strike vote. In such instances the Board conducted "the vote among a group corresponding as nearly as possible to a unit which would be appropriate for collective bargaining."²⁹ However, the Board carefully pointed out that determination of such a unit in no way established a precedent in any future case involving the establishment of a unit for collective bargaining purposes.

Strike-Vote Procedure

Once a strike-notice was received, the N.L.R.B. instituted an investigation of the dispute. This was necessary because in addition to conducting the election, the Board also was required to indicate on the ballot the major issues of the controversy. Consequently the agency was required to keep abreast of the developments in the dispute so that the issues set forth on any eventual ballot would accurately reflect the matters involved in the controversy. Recognizing, however, that the function of settling wartime disputes, under the terms of the War Labor Disputes Act, was vested in the Conciliation Service of the Department of Labor and in the National War Labor Board, the N.L.R.B. made no investigation

²⁵ War Labor Disputes Act, Sec. 2. ²⁶ National Labor Relations Board, *op. cit.*, p. 76.

²⁷ National Labor Relations Board, *Ninth Annual Report* (1944), p. 72.

²⁸ National Labor Relations Board, *Tenth Annual Report* (1945), p. 76.

²⁹ National Labor Relations Board, *Eighth Annual Report* (1943), p. 77.

of a dispute during the first week after a strike-notice was filed.³⁰ Thus, the Conciliation Service was given the exclusive opportunity to settle the controversy before any N.L.R.B. investigation. It should be stressed in this connection that the primary interest of the N.L.R.B. during the thirty-day "waiting period" was to ascertain the issues involved in the dispute, and not to settle the controversy.

During the course of the investigation, the N.L.R.B., unlike its procedure in collective bargaining dispute cases, did not provide for formal hearings with respect to the strike dispute. This policy was adopted because of the requirement that the election be conducted forthwith on the thirtieth day after receipt of the strike-notice.³¹ In the light of such a rigid mandate, formal hearings, always a time-consuming process, were precluded by the speed demanded by the law. Furthermore the law also directed that the results be certified forthwith after the strike election had been conducted. The Board interpreted this mandate as certification on the day following the balloting. Under such circumstances, the N.L.R.B. was again required to modify its procedure adopted for representation elections. In such cases, ample opportunity is afforded to parties involved in bargaining elections to challenge voters and to file objections to the conduct of the election.³² Where representation elections are challenged upon valid grounds, the Board may even invalidate the results and direct a new ballot.³³ Because of the speed demanded in strike election cases, however, such privileges were not extended to the participating parties. Though the Board permitted a labor organization or an employer to challenge voters, the Board's agent conducting the election ruled on any such objections at the time of the election and no appeal from the ruling was entertained.³⁴ By adopting such a streamlined procedure the N.L.R.B. satisfied the rigid mandate of Congress and conducted strike elections forthwith on the thirtieth day after the receipt of strike-notices and certified the results forthwith to the public and the President on the day following the balloting.

Framing the Ballot

Though the N.L.R.B. did not conduct formal hearings to ascertain the issues in a dispute, the parties to the controversy were given full opportunity to present their views on the matter.³⁵ Furthermore the Board maintained "close and continuous contact" with the Conciliation Service and with the National War Labor Board during the thirty-day "waiting

³⁰ *Ibid.*, p. 78.

³¹ War Labor Disputes Act, Sec. 8(3).

³² National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, July 12, 1944, p. 17.

³³ See Ludwig Teller, *Labor Disputes and Collective Bargaining* (Baker, Voorhis & Co., New York, 1940), vol. 2, p. 914.

³⁴ National Labor Relations Board, *Eighth Annual Report* (1943), p. 79.

³⁵ *Ibid.*, p. 78.

period" inasmuch as the strike ballot had to contain a statement as to the facilities being utilized by the parties to settle the dispute.³⁶ The investigation of the controversy and any eventual strike vote was carried out under the supervision of the N.L.R.B. regional director in whose region the dispute may have occurred, but the Board itself reviewed regional directors' findings and set forth the content of the ballot.³⁷

In a typical strike ballot, the N.L.R.B. stated the issues precisely. For example:

The objection of the Allis-Chalmers Workers, District 50 United Mine Workers of America, to compliance on the part of this war contractor with an order of the National War Labor Board, the effect of which required the company to execute and maintain in effect until Apr. 15, 1944, a collective bargaining agreement signed with Local 120, United Farm Equipment and Metal Workers of America (C.I.O.) pursuant to an NLRB certification.³⁸

Finally the workers were always asked the identical question, which was prescribed by the War Labor Disputes Act. This question was: "Do you wish to permit an interruption of war production in wartime as a result of this dispute?"³⁹

Analysis of Strike-Vote Results

During the fiscal year 1944, 1089 strike notices were filed with the N.L.R.B. Of this number, 115 cases were dismissed because the dispute did not involve a "war contractor." Of the 974 valid and effective notices filed during the year, the Board took action in 920 instances. Strike votes were actually taken in 232 cases or in 381 separate voting units.⁴⁰ Since one notice may have involved an employer unit consisting of multiple plants, it was often necessary for the N.L.R.B. to conduct strike-vote elections in several production units of the same company. It should be expected, therefore, that the number of actual election units would always exceed the number of strike election cases. The fact that the N.L.R.B. was required to conduct strike votes in only 232 out of the 920 cases indicates that the vast majority of the disputes giving rise to strike-notices were settled peaceably. In this connection the N.L.R.B. gives due credit to the U.S. Conciliation Service and to the National War Labor Board for their successful efforts in settling wartime labor disputes.⁴¹

Of the 381 strike polls, however, a majority of the employees voted *not* to strike in only 44 instances. In 2 cases the elections resulted in tie votes, and in 12 instances employees involved did not desire to exercise their voting privilege and accordingly no votes were cast. Thus a majority

³⁶ *Ibid.*, p. 77. ³⁷ *Ibid.*, p. 78.

³⁸ "N.L.R.B. Begins Its Strike Vote Duties," *op cit.*, p. 841.

³⁹ See War Labor Disputes Act, Sec. 8(a)(3).

⁴⁰ National Labor Relations Board, *Ninth Annual Report* (1944), p. 72. See *infra*, p. 72, for the 1945 strike-vote experience.

⁴¹ National Labor Relations Board, *Eighth Annual Report* (1943), p. 78.

voted to strike in 323 cases out of the 381 strike polls.⁴² Of the total workers polled in the elections, only 28,246 out of the 98,224 voted not to strike. Affiliates of the A.F.L. were polled in 311 election units and they voted to strike in 263 cases. In contrast, the unions of the C.I.O. were polled in only 27 instances in which they voted to strike in 24 cases. Out of the 47,417 A.F.L. members casting ballots in strike elections, 36,562 voted to strike as compared to the C.I.O. record which indicated that only 20,699 workers voted to strike out of the 27,311 C.I.O. members polled.⁴³ Unaffiliated unions voted to strike in 36 cases out of the 43 times in which they were polled. Of the total unaffiliated workers polled, 12,717 voted to strike, and 10,779 voted not to strike. It appears that the A.F.L. affiliates indicated their desire to interrupt war production in a greater number of instances than did C.I.O. or unaffiliated unions. Furthermore the record indicates that the representative in Congress who believed that war workers, given a chance to vote secretly on the issue of wartime strikes, would uniformly vote against striking was in error.⁴⁴ In either war or peace, therefore, it appears that a better way to reduce the number of strikes in a democratic society is through the elimination of the causes of strikes and not by strike votes.

Influence of Strike Polls

Of greater significance than the number of strike polls conducted, or the proportionate number of times employees voted to strike, is the issue of how many strikes actually occurred after the N.L.R.B. conducted strike elections. Contrary to some views,⁴⁵ the War Labor Disputes Act did not outlaw strikes in privately operated plants after the thirty-day "waiting period." As indicated before, the law merely outlawed strikes in those facilities seized by the government. On the other hand, nothing in the War Labor Disputes Act prohibited strikes in private plants even though a majority of the workers voting in an election cast ballots against striking. However an inspection of the statute also indicates that it did not actually authorize strikes in the event that a majority favored interrupting war production. It was in this respect that President Roosevelt found great fault with the measure.⁴⁶

It appears that a strike would be encouraged when a majority voted to interrupt production. Had no vote been taken, the U.S. Conciliation Service, the N.W.L.B., or the efforts of public-spirited labor leaders and employers might have possibly effected a peaceful settlement of the dispute. A favorable strike vote, on the other hand, appeared to give a mandate to union leaders to call the strike, and would even give a basis of

⁴² National Labor Relations Board, *Ninth Annual Report* (1944), p. 73.

⁴³ See *supra*, n. 14.

⁴⁴ See Millis and Montgomery, *op. cit.*, p. 599.

⁴⁵ "Passage of War Labor Disputes Act," *op. cit.*, p. 632.

⁴⁶ *Ibid.*, p. 92.

apparent government sanction to the work stoppage. This is what President Roosevelt apparently desired to avoid when he stated, "in wartime we cannot sanction strikes with or without a notice."⁴⁷ Nonetheless a strike in a private plant after thirty days, regardless of election results, did not violate the War Labor Disputes Act. On this vital point the N.W.L.B. declared that, "there is no doubt that, after the taking of such a vote, whatever its outcome and unless and until the plant is taken over by the President under Section 3 of the Act, a strike may lawfully be called. But the moral obligation not to strike in wartime remains."⁴⁸

In a study conducted by the Bureau of Labor Statistics, it is indicated that in the first full year of the operation of the War Labor Disputes Act (June 25, 1943-June 25, 1944), the N.L.R.B. polled war workers on the issue of striking in 230 instances. Of this number, employees voted to strike in 203 cases. But only 64 strikes, involving 47,718 workers actually took place following the elections.⁴⁹ These strikes amounted to only 1.4 per cent of all strikes which occurred in that period. The 41,718 workers who actually participated in the strikes constituted only 2.4 per cent of all workers who engaged in strikes during the year under consideration. It appears that strike elections had little influence in decreasing the number of work stoppages effected subsequent to the polls. In spite of favorable strike votes, labor kept its no-strike pledge approximately 69 per cent of the time. Those strikes which did take place probably would have occurred regardless of election results. In fact, strike elections, as noted, probably encouraged some strikes which otherwise would not have occurred.

Strike-notices filed with the N.L.R.B. during the fiscal year 1945 increased over the number submitted during the previous twelve months. Whereas 1089 notices were filed in 1944, the number grew to 1284 in 1945. In 52 cases strike-notices were dismissed because the employees involved in the controversy were not workers of a war contractor within the meaning of the War Labor Disputes Act. Of the valid cases, the N.L.R.B. polled workers in 404 cases which resulted in 573 separate elections.⁵⁰ In 482 elections a majority of the workers involved voted to strike. Of the 540,242 workers polled, 442,769 voted in favor of interrupting war work. Whereas a total of only 98,224 voters were polled in the fiscal year 1944, the number of votes cast in 1945 elections increased to 540,242. While 96,776 A.F.L. union members voted to strike, only 43,481 C.I.O. affiliated workers cast ballots to interrupt war production.

In the calendar year 1945, workers voted to strike in 1249 polls.⁵¹

⁴⁷ *Ibid.*, p. 648. ⁴⁸ Bureau of National Affairs, *War Labor Reports*, vol. 11, p. 520.

⁴⁹ *Monthly Labor Review*, September, 1944, vol. 59, p. 572.

⁵⁰ National Labor Relations Board, *Tenth Annual Report* (1945), pp. 76 and 92.

⁵¹ *Monthly Labor Review*, May, 1946, vol. 62, p. 734. The N.L.R.B. conducted 1445 strike-polls in the calendar year 1945.

Actually 213 strikes occurred after the N.L.R.B. administered these elections. Although the absolute number of strikes effected subsequent to strike elections increased to 213 in the calendar year 1945 as compared to the 64 reported during the first year of the operation of the War Labor Disputes Act, the percentage dropped in 1945 to approximately 17 per cent as compared to approximately 31 per cent in the first year. Accordingly labor with respect to favorable strike-vote elections kept its wartime no-strike pledge about 83 per cent of the time in 1945 as compared to 69 per cent in the period June 25, 1943 to June 25, 1944. As in the latter period, the results for the calendar year 1945 indicate that the War Labor Disputes Act strike polls had little influence on the number of work stoppages subsequently effected. Indeed, as favorable strike votes gave the appearance of government approval of work stoppages, one might have reasonably expected more strikes than actually occurred.

Consideration of the causes of strikes actually effected after elections, however, reveals that some labor organizations engaged in strikes because of dissatisfaction with directives of the National War Labor Board. A study of a report of the Bureau of Labor Statistics indicates that although disputes over wages were the major source of such strikes, approximately 30 per cent of them resulted "from non-compliance by either workers or management with directives of the War Labor Board."⁵² Included in that figure, of course, were the strikes caused by some employers' refusal to grant to labor their awards as determined by the N.W.L.B. On that score such strikes might at least be explained. In view of the requirements of war, however, there existed no apparent extenuating circumstances condoning a strike called by labor organizations because of dissatisfaction with awards issued by the N.W.L.B. In a democratic society, strikes effected at any time to coerce governmental agencies are clearly improper. During wartime, such strikes, moreover, indicate a high degree of disloyalty.

Strike-Vote Duties

The work of the N.L.R.B. in the administration of the Wagner Act increased enormously during the war years as compared with its activities in the prewar period. In the fiscal years 1941-1945, the N.L.R.B. conducted over 85 per cent of all representation elections and "cross-checks" held by the Board since its creation in 1935. Whereas in the fiscal years 1936-1940 the N.L.R.B. conducted only 3386 elections and "cross-checks," in which 1,225,098 employees were polled, the number of elections and "cross-checks" conducted by the N.L.R.B. during the period 1941-1945 increased to 20,562 in which 4,889,627 valid votes were cast.⁵³ Al-

⁵² *Ibid.*, p. 734.

⁵³ National Labor Relations Board, *Tenth Annual Report* (1945), p. 8.

though the relative importance of unfair labor practice cases as compared to representation disputes decreased during the war years,⁵⁴ their absolute importance did not materially change. Thus 18,187 unfair labor practice cases were filed with the N.L.R.B. during the fiscal years 1941-1945, as compared with 19,119 cases filed with it during the period 1936-1940.⁵⁵ Not only did the work of the N.L.R.B. increase greatly during the war years, but it also suffered important losses in personnel. There was a total reduction of its staff from 889 on July 1, 1942, to 736 on October 30, 1943. Moreover, the Board experienced a large labor turnover losing 28 per cent of its male employees to the armed forces at the beginning of the fiscal year 1943, and 38 per cent of the number by October 30, 1943.⁵⁶ Such a turnover, of course, meant that less experienced personnel replaced former employees, the resultant problem being to maintain efficiency.

When viewed in the light of the National Labor Relations Board increased wartime work load and personnel problems, the Board's strike-vote duties became more significant. It would be expected that the agency's ability to administer the Wagner Act would suffer to the degree that the Board's energies and funds were directed to strike-vote duties. Nevertheless from June 25, 1943, until August 14, 1945, the N.L.R.B. disposed of its obligations under the War Labor Disputes Act with no apparent serious effects on its Wagner Act duties. After the end of World War II, however, labor was released from its wartime no-strike pledge, and trade unions flooded the N.L.R.B. with strike-notices.⁵⁷ During the period August 15, 1945, to October 15, 1945, the N.L.R.B. received 693 strike-notices.⁵⁸ During the month of September, 1945, 307 such notices were filed, and in October, 1945, the figure reached the unprecedented total of 666.⁵⁹ As noted, in the fiscal years 1944 and 1945, there were filed with the N.L.R.B. 1089 and 1284 strike-notices respectively. Thus in October, 1943, alone, strike-notices submitted to the N.L.R.B. totaled more than 50 per cent of all notices filed in the fiscal year 1944 or 1945.

In view of the above figures it is not difficult to envisage the paralytic effects of the strike-vote duties on the usual functions of the N.L.R.B. The Board was not able to give priority to Wagner Act cases. No time limit is placed on the Board by the terms of the Wagner Act, but under

⁵⁴ See p. 24 for an analysis of this development.

⁵⁵ National Labor Relations Board, *Tenth Annual Report* (1945), p. 6.

⁵⁶ National Labor Relations Board, *Eighth Annual Report* (1943), p. 3.

⁵⁷ The War Labor Disputes Act did not expire on August 14, 1945. Instead the statute was to become ineffective at the end of six months following the termination of World War II hostilities, as proclaimed by the President, or upon the date of concurrent resolution of the two Houses of Congress invalidating the Act. War Labor Disputes Act, Sec. 10. Thus labor unions after V-J Day were still required to file strike-notices. On December 31, 1946, President Truman proclaimed World War II hostilities terminated. *New York Times*, January 1, 1947, p. 1.

⁵⁸ *Labor Relations Reporter*, October 22, 1945, vol. 17, p. 215.

⁵⁹ National Labor Relations Board, *Tenth Annual Report* (1945), p. 77.

the provisions of the War Labor Disputes Act, the N.L.R.B., as indicated, was required to conduct a strike election on the thirtieth day after receipt of a strike-notice, and to certify the results of the election on the next day. Here an anomalous situation developed in which an extra duty caused the Board to neglect almost completely its fundamental obligations. Furthermore, the Board's strike-vote duties became logically inconsistent after August 14, 1945. The question asked by the N.L.R.B. was always whether the employees involved in a dispute desired to interrupt war production. That was the question required by statute. An employer, confronted with a postwar strike election, appropriately stated that the question had no meaning after August 14, 1945, as employees could not strike to stop war production because there was no war and no war production.⁶⁰

In setting forth the specific effects of conducting strike votes on the usual functions of the N.L.R.B., it was reported that four of the Board's twenty-four regional offices in the months following the end of the war were doing nothing but processing strike-vote cases to the complete exclusion of handling matters under the Wagner Act. Half of the remaining offices were concerned "predominantly" with the holding of strike votes.⁶¹ During a Congressional hearing, Houston, member of the N.L.R.B., testified that the agency during the months following the termination of the war had received "strike-notices covering the employees of General Motors, Chrysler, and Ford at their plants scattered from coast to coast. . . . In effect they demand that our agency poll employees in numbers matching political elections."⁶² According to Houston, the three elections mentioned above would have cost \$100,000. Early in June, 1945, even before the end of the war, the N.L.R.B. was required to suspend all new actions under the Wagner Act for the remainder of the fiscal year 1945. As strike-vote duties exhausted its funds, the N.L.R.B. directed its regional offices to cease making long distance phone calls, to refrain from out-of-town travel, and to suspend all public hearings.⁶³

Recognizing the serious plight of the Board, Congress, in December, 1945, finally relieved the N.L.R.B. of its strike-vote responsibilities. This was accomplished by forbidding the N.L.R.B. to use its funds for the purpose of conducting strike-polls. President Harry Truman approved

⁶⁰ "Proposed Repeal of War Labor Disputes Act," *op. cit.*, p. 215. Of course the employer meant that the "shooting war" had terminated after August 14, 1945, V-J Day. The fact that the nation was still in a legal "state of war" scarcely detracted from his argument.

⁶¹ "No-Strike Contract No Bar to Strike Poll," *Labor Relations Reporter*, November 12, 1945, vol. 17, p. 312. In a personal interview, George J. Bott, wartime Regional Director of the N.L.R.B., Thirteenth Region, stated that his staff (located in Chicago) devoted about 75 per cent of its energies to strike-vote duties after V-J Day. Although trade unions and employees were permitted to file unfair labor practice charges, the Chicago office, according to Bott, under the pressure of its strike-vote duties, could not process them. In representation cases, Bott's staff, working under severe handicaps, made earnest attempts to dispose of those matters.

⁶² "Proposed Repeal of War Labor Disputes Act," *op. cit.*, p. 215.

⁶³ "Current Funds for N.L.R.B. Exhausted," *Labor Relations Reporter*, June 18, 1945, vol. 16, p. 516.

the legislation on December 28, 1945.⁶⁴ This action ended a phase of the wartime operations of the N.L.R.B. The War Labor Disputes Act imposed an additional burden on the N.L.R.B. during a period of time when the agency could least afford the assumption of the extra duty. War production and postwar industrial reconversion probably would have been advanced had the N.L.R.B. been able to devote its full attention to the increasing wartime work and problems arising under the Wagner Act. As indicated, strike-polls did not decrease the number of strikes effected during the war years, but instead they probably increased such work stoppages. In view of these considerations, it appears that the N.L.R.B. strike-vote functions failed to accomplish much towards furthering wartime industrial peace. Evidently Congress, by imposing the strike-vote burden on the N.L.R.B., caused the Board to dissipate its energies and to expend public money for an extremely questionable purpose.

Effect of Favorable Strike Votes on Certification

In accordance with the ruling of the Attorney General, the N.L.R.B., as noted before, accepted strike-notices from minority labor organizations.⁶⁵ Such a ruling was rendered because a minority union, as well as a majority labor organization, might have been involved in a dispute which could have interrupted war production. Consequently, in the first week of August, 1943, the N.L.R.B. conducted a strike vote among the employees of a plant as a result of a strike-notice submitted by an uncertified union — District 50 of the United Mine Workers of America. Previously the same labor organization, claiming to represent a majority of the plant's workers, had petitioned the N.L.R.B. for a representation election. In line with a long established policy,⁶⁶ the Board refused to entertain the petition because of the existence of a valid labor contract.⁶⁷ Accordingly, the Board pointed out that "the existing contractual relationship between the company and the C.I.O., expiring April 15, 1944, constitutes a bar to a determination of representatives at this time."⁶⁸ However, the N.L.R.B. invited the United Mine Workers of America to resubmit its representation petition when the existing contract was about to expire. Subsequently, however, on June 25, 1943, the War Labor Disputes Act was enacted,

⁶⁴ First Deficiency Appropriation Act, 1946 Public Law 269, 79th Congress, 1st Session. A similar restriction was placed on the availability of the Board's funds for the fiscal year 1947 under terms of the N.L.R.B. Appropriation Act of 1947, Title IV, Act of July 26, 1946, Public Law 549, 79th Congress, 2nd Session. This restriction was necessary until July 1, 1947, to relieve the N.L.R.B. of its strike-vote responsibilities inasmuch as the War Labor Disputes Act was still in operation until that date. See p 74, n. 57.

⁶⁵ "N.L.R.B. Begins Its Strike Vote Duties," *op cit.*, p. 841.

⁶⁶ See p 139, where an analysis is made of the N.L.R.B. "one-year rule." Ordinarily, the Board, in the interest of labor relations stability, would not upset a legitimate collective bargaining contract which had not run one year.

⁶⁷ In the matter of *Allis-Chalmers Manufacturing Company*, 50 N.L.R.B. 306 (1943). Specifically, the employer had executed a contract with a C.I.O. union.

⁶⁸ *Ibid.*, p. 312.

and the miners' union utilized the law's strike-vote machinery in an attempt to effect an eventual N.L.R.B. certification.

On July 5, 1943, the labor union filed a strike-notice with the N.L.R.B. claiming that a threat to uninterrupted war production had arisen because of the union's failure to secure a representation election. The union in reality sought to utilize the strike ballot "to bring pressure in the form of a strike threat to bear upon the [N.L.R.B.] in hope of attaining a more favorable decision."⁶⁹ The union used the strike-vote machinery to dramatize its dissatisfaction with a decision rendered by a government agency. In effect, the labor organization threatened to strike unless the N.L.R.B. reconsidered its decision with respect to the United Mine Workers' petition for a redetermination of bargaining agents. Such conduct on part of a labor organization is reprehensible in any period, and during wartime its action smacked of disloyalty. It should be noted, however, that during the war period such conduct occurred in a negligible number of instances.⁷⁰

Notwithstanding the moral issue involved in the case, the N.L.R.B., on August 4, 1943, in accordance with the ruling of the Attorney General, conducted the strike vote.⁷¹ The results of the election proved that a majority of those employees voting in the election cast ballots in favor of striking. On the other hand, those voting in favor of striking did not constitute a majority of those eligible to vote.⁷² Believing that the outcome of the strike-poll would influence the N.L.R.B. to reconsider its former position, the United Mine Workers Union again requested a representation election. But once more the N.L.R.B. refused to entertain the union's certification petition. This ruling of the N.L.R.B. demonstrated that coercion could not be utilized for the purpose of effecting a compromise of its principles.

Still dissatisfied with the Board's decision, the United Mine Workers Union appealed to the National War Labor Board. The union continued to believe that the N.L.R.B. should entertain a representation petition because of the organization's apparent success in the strike-vote election. The union still refused to recognize the fact that a victory in a strike-poll did not affect the certification powers of the N.L.R.B. Consequently the union hoped that the N.W.L.B. would set aside the ruling of the N.L.R.B., order a representation election, and eventually certify the union as the exclusive bargaining representative of the workers in the affected plant. But the N.W.L.B. refused jurisdiction of the case pointing to the fact that

⁶⁹ National Labor Relations Board, *Ninth Annual Report* (1944), p. 73.

⁷⁰ The N.L.R.B. reports that only ten dispute-notices were filed during the fiscal year 1944 threatening a strike because of dissatisfaction with Board rulings. See National Labor Relations Board, *Ninth Annual Report* (1944), p. 73.

⁷¹ *In the matter of Allis-Chalmers Manufacturing Company*, 52 N.L.R.B. 100 (1943).

⁷² *Ibid.*, p. 101. The results were: of the approximately 2200 eligible voters, 1005 voted in favor of striking and 836 voted against interrupting production.

both the Executive Order under which it was created, and the War Labor Disputes Act from which it derived statutory authority, prohibited the N.W.L.B. from taking action inconsistent with a ruling of the N.L.R.B.⁷³ In rejecting the union's contention, the N.W.L.B. declared that it had no "jurisdiction to conduct an employee election to determine bargaining agents, where the N.L.R.B. had refused to conduct elections on grounds that union contracts executed for a reasonable time with a lawful agent is presently in effect, despite contention of rival unions that employees prefer it as a bargaining agent since majority of employees in strike vote held under terms of War Labor Disputes Act voted to strike over representation dispute."⁷⁴

By virtue of rulings rendered by the two most powerful wartime labor agencies, the principle was established that labor organizations could not effect an N.L.R.B. certification proceeding merely because they were successful in a strike-poll. A contrary rule would probably have caused a large measure of industrial unrest, raiding of union memberships, unnecessary strike-polls, and a lowered prestige of governmental agencies. Moreover, a contrary ruling would have punished unfairly the vast majority of labor organizations which unhesitatingly accepted in good faith the decisions and orders issued by wartime labor agencies.

Applicability of the N.L.R.A. to Violators of the Strike-Notice Provision

Under the terms of the War Labor Disputes Act, the representative of the employees of a war contractor before effecting a strike was required to file a strike-notice with the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board. No interruption of war production, furthermore, could lawfully occur until after the N.L.R.B. conducted a strike-poll on the thirtieth day subsequent to the filing of the notice.⁷⁵ Any labor organization official who effected a strike in violation of the law was liable for any damages caused by the work stoppage, and the district courts of the United States were given the authority to enforce the provisions.⁷⁶ On the other hand, the National Labor Relations Act guaranteed to employees their right "to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection."⁷⁷ To make this right meaningful, the N.L.R.B. was given statutory authority to prevent employers from interfering with the right

⁷³ See chap. 7 for an analysis dealing with the jurisdictional problems that existed between the N.L.R.B. and N.W.L.B.

⁷⁴ *In re Allis-Chalmers Manufacturing Company*, 11 War Labor Reports 518 (1943).

⁷⁵ War Labor Disputes Act, Sec. 8(2). ⁷⁶ *Ibid.*, Sec. 8(c).

⁷⁷ National Labor Relations Act, Sec. 7.

of employees to self organization or with their right to engage in concerted activities.⁷⁸ Thus the question arose as to whether the N.L.R.B. could extend the protection of the Wagner Act to violators of the strike-notice provision of the War Labor Disputes Act.

Strikes have always been a form of "concerted activity" guaranteed to employees under the terms of the Wagner Act. In fact the law specifically stated that nothing in the National Labor Relations Act should be construed so as "to interfere with or impede or diminish in any way the right to strike."⁷⁹ In its administration of the law, the N.L.R.B. has consistently directed employers to reinstate workers discharged because of employers' unfair labor practices. An employer, furthermore, who engages workers to replace employees who struck because of unfair labor practices must upon the request of such striking employees reinstate them even though the reinstatement results in the discharge of the workers employed to replace the strikers.⁸⁰ However, to encourage settlement of disputes caused by employers' unfair labor practices through the peaceful machinery of the Board rather than by industrial warfare, the N.L.R.B. ordinarily will not order back pay to employees who strike because of unfair labor practices. Only when an employer refuses to reinstate such employees upon their request, or offers them reinstatement under discriminatory conditions will the Board award back pay. But the back pay will commence only from the date of refusal of reinstatement or from the date of discriminatory offer of reinstatement.⁸¹ In contrast, employees who strike for reasons other than unfair labor practices are not entitled to reinstatement unless their jobs have not been filled previous to the time of their request for reinstatement.⁸² On the other hand, the N.L.R.B. has consistently refused to afford the protection of the Wagner Act to strikers who engage in unlawful conduct while on strike.⁸³

In view of such precedents, the question of whether violators of the War Labor Disputes Act strike-notice provision could expect protection from the Wagner Act depended on whether or not a strike effected in violation of the War Labor Disputes Act could still be regarded as a form of "concerted activity" within the meaning of the National Labor Relations Act. In short, the problem was whether or not an employee who

⁷⁸ *Ibid.*, Sec. 8. ⁷⁹ *Ibid.*, Sec. 13.

⁸⁰ *In the matter of Biles-Coleman Lumber Corporation*, 4 N.L.R.B. 679 (1937), enforced 98 Fed. (2d) 18 (CCA-2, 1938); *In the matter of Oregon Worsted Company*, 3 N.L.R.B. 36 (1937), enforced 96 Fed. (2d) 193 (CCA-9, 1938).

⁸¹ *In the matter of American Manufacturing Company*, 5 N.L.R.B. 443 (1938), affirmed 309 U.S. 629 (1940).

⁸² *N.L.R.B. v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938).

⁸³ See *In the matter of Standard Lime & Stone Company*, 5 N.L.R.B. 106 (1938), in which the Board refused to order the reinstatement of employees charged with dynamiting; and *In the matter of Kentucky Firebrick Company*, 3 N.L.R.B. 455 (1937), in which an employee charged with murder was denied reinstatement. Employees engaging in a "sit-down strike" are denied protection of the Wagner Act, *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

authorized a strike, and who struck, without conforming to the strike-notice provisions of the War Labor Disputes Act could be reinstated by the N.L.R.B.⁸⁴ Are such employees placed beyond the pale of the Wagner Act? Viewed in its theoretical aspects the problem intrigues the student of labor relations, but when considered in the light of war conditions, the issue becomes of first-rate importance. Indeed this question was one of the most momentous ruled upon by the N.L.R.B. during the war period.

Notwithstanding the questionable wisdom of the legislation, the War Labor Disputes Act was a law enacted by the Congress of the United States. As such, the statute demanded full respect from all the nation, including due regard from all government agencies. Though the legislation, as noted, provided for its own enforcement, practical difficulties were involved in proving the actual damage caused by a strike effected in violation of the strike-notice provisions of the statute. Moreover by making labor leaders liable only in civil proceedings for such damages, the enforcement provisions were further weakened and complicated. But if violators of the War Labor Disputes Act were deprived of all protection of the Wagner Act, an effective and practical method of enforcing the War Labor Disputes Act would have been available. Here was a simple, effective, and ready remedy. Employees who effect a strike in violation of the War Labor Disputes Act would lose all rights under the Wagner Act. Even though an employer refused such an employee's application for reinstatement the employer would not be required to comply with the worker's request regardless of whether his job had been filled. In addition the N.L.R.B. would find no violation of the Wagner Act if the employer volunteered to reinstate the employee under discriminatory terms.

The N.L.R.B. had a difficult choice to make. If it aided the enforcement of the War Labor Disputes Act, the Board would to that degree restrict the application of the National Labor Relations Act. On the other hand, if the Board refused to compromise the provisions of the Wagner Act under such circumstances, it could be expected that the agency would be criticized for failure to give due credit to a federal wartime statute. The problem was further complicated by the fact that in a previous case the N.L.R.B. refused to extend the protection of the Wagner Act to employees who engaged in a strike to force an employer to violate the Wage

⁸⁴ In this connection, the question was not whether the rank-and-file employees were affected by the War Labor Disputes Act. A careful inspection of the Act reveals that it places no responsibilities on the ordinary employee. Sec. 8(a)(1) states that "the representative of the employees of a war contractor shall give . . . notice of any such labor dispute involving such contractor and employees." Again Sec. 8(c) provides penalties for "any person who is under a duty to perform any act required" under the terms of the legislation. Consequently, the term "employee" as utilized in this section means "representative of the workers of a war contractor," or, in other words, a union official.

Stabilization Act of October 2, 1942.⁸⁵ By similarly restricting the application of the Wagner Act to violators of the War Labor Disputes Act, the N.L.R.B. at once could have aided in the enforcement of a wartime federal labor statute, supported the precedent established in the *American News* case, and satisfied the element who believed that such a ruling would discourage wartime strikes.

When the problem was ultimately presented to the N.L.R.B., however, the agency refused to restrict the application of the Wagner Act, and ordered the reinstatement of workers who violated the War Labor Disputes Act.⁸⁶ Not only did the N.L.R.B. rule that the rank-and-file employees engaging in the unlawful strike retained their rights under the Wagner Act, but that the protection of the Act was equally available to the officers of the union who failed to comply with the strike-notice mandate of the War Labor Disputes Act. To justify its decision the Board asserted that had the Congress intended to deprive violators of the War Labor Disputes Act of their rights under the Wagner Act, the War Labor Disputes Act would have contained an appropriate provision.

In view of the legislative history of the War Labor Disputes Act, the N.L.R.B. probably could not have handed down a contrary ruling. Sufficient evidence exists which indicates that Congress considered and rejected the possibility of excluding violators of the War Labor Disputes Act from the protection afforded by the National Labor Relations Act. During the debate on the law, Congressman May of Kentucky stated:

The conferees were of the opinion when we got through with the legislation, and are of the opinion now, as I am, that we have not done anything in this legislation to offend any labor group, but have left in their hands largely the power to control their own activities without dictation from anybody else or anyone, and that we have provided protection for all of their rights under the Wagner Labor Relations Act . . . without any impairment whatever of those rights.⁸⁷

Congressman Thomason of Texas in this respect also declared: "We have not repealed or altered a single word or line in the National Labor Relations Act. Whatever rights the laboring man or the labor union now have under the National Labor Relations Act, they still have them under this bill."⁸⁸

In distinguishing the *American News* doctrine from the *Republic Steel* case, the N.L.R.B. pointed out that in the *American News* case "the purpose of the strike was illegal and that such a strike was not a 'concerted activity' protected by the National Labor Relations Act."⁸⁹ On the other hand, the issue giving rise to the strike in the instant case was a

⁸⁵ See pp. 89-96 for an analysis of the ruling of the N.L.R.B. in the *American News* case, 55 N.L.R.B. 1302 (April 14, 1944).

⁸⁶ *In the matter of Republic Steel Corporation*, 62 N.L.R.B. 1008 (June 30, 1945).

⁸⁷ *Congressional Record*, June 11, 1943, vol. 89, p. 5781.

⁸⁸ *Ibid.*, p. 5784.

⁸⁹ *In the matter of Republic Steel Corporation*, *op. cit.*, p. 1024.

dispute engendered by the promotion of an employee to the position of foreman, and the strike which ensued was one, the Board ruled, for a legal purpose and was carried out in a lawful manner.⁹⁰ Giving due weight to the apparent intent of the Congress, the Board finally concluded that "the Congress did not intend specifically, or generally as part of its legislative policy, that the rights of employees, whether they be rank and file or representative, under the National Labor Relations Act be affected by the War Labor Disputes Act. Although we do not condone the conduct of the strikers here involved, we are of the opinion and find that the policies of this Act [Wagner Act] and our wartime labor policy as a whole will best be effectuated by according to them the protection of this Act."⁹¹

The decision of the N.L.R.B. in this matter was not rendered unanimously.⁹² Board Member Reilly, in one of his dissenting opinions,⁹³ believed the N.L.R.B. should not have ordered the reinstatement of the union officials who effected the strike. He apparently, however, would not have objected to the reinstatement of the striking rank-and-file members. He further believed that the Supreme Court's *Fansteel*⁹⁴ and *Southern Steamship*⁹⁵ decisions controlled the instant matter. As noted before, the high Court deprived workers who engaged in a "sit-down strike" or who were guilty of mutiny aboard ship of any Wagner Act rights. In this connection, Reilly declared that the majority contravened "the views expressed by the Supreme Court."⁹⁶ Moreover, he was of the opinion that the instant case could not be differentiated from the *American News* doctrine as he believed workers in both instances violated a federal statute. Neither did Reilly believe that the majority's opinion was justified by the legislative history of the War Labor Disputes Act. Evidently he considered that the latter law did not affect any Wagner Act rights enjoyed by rank-and-file workers. On the other hand, he insisted that officers of labor unions who effected a strike in violation of the strike-notice provision of the War Labor Disputes Act lost all benefits afforded by the National Labor Relations Act. In this connection, he pointed out that

⁹⁰ Because the strike was conducted in a lawful manner, the Board distinguished the instant case from the *Fansteel* decision and from *N.L.R.B. v. Southern Steamship Company*, 316 U.S. 31 (1942), a case in which the Supreme Court deprived seamen engaging in mutiny of any benefits stemming from the National Labor Relations Act.

⁹¹ *In the matter of Republic Steel Corporation*, p. 1026.

⁹² Harry A. Mills, Chairman of the N.L.R.B., and Board Member John M. Houston rendered the majority decision. Board Member G. D. Reilly dissented.

⁹³ During the war period, Reilly dissented from the majority in many important decisions. In fact, his dissents so antagonized one of the major labor organizations of the nation that the union in a formal resolution denounced him: "The C.I.O. condemns the activities and policies of Gerald Reilly. His expressed bias and prejudice and unprincipled administration which results in the practical negation of the benefits guaranteed by the Wagner Act should compel his removal from the National Labor Relations Board." Congress of Industrial Organizations, *Seventh Constitutional Convention* (1944), p. 228. Reilly left the Board on August 13, 1946, and was succeeded by James Reynolds on August 26, 1946, *New York Times*, August 12, 1946, p. 14.

⁹⁴ *Supra*, *N.L.R.B. v. Fansteel Metallurgical Corporation*.

⁹⁵ *Supra*, *N.L.R.B. v. Southern Steamship Company*.

⁹⁶ *In the matter of Republic Steel Corporation*, *op. cit.*, p. 1037.

the failure of Congress to include in the War Labor Disputes Act a suitable provision which would have specifically excluded such violators of that statute from the jurisdiction of the N.L.R.B. merely indicated a desire of Congress "to restrain labor leaders from concerted activity endangering the war effort without providing any penalty against those persons to whom responsibility for such activity could not be imputed."⁹⁷

During the months following the end of the World War II the Board again had occasion to deal with the problem. As noted, the War Labor Disputes Act was not invalidated on August 14, 1945, V-J Day, and accordingly its provisions with respect to strike-notices remained operative. In line with the *Republic Steel* case, the N.L.R.B. rejected the contention of an employer that failure to file a strike-notice and failure to refrain from striking for a thirty-day period thereafter placed the strikers beyond the protection of the National Labor Relations Act. In deciding this post-war case the Board declared that "the nature of the strikers' conduct and the manner in which the strike was called neither remove the Act's protection from this type of concerted activity as a matter of law nor move us in the exercise of our discretion to deny such protection to the strikers."⁹⁸

A contrary rule during peacetime could not reasonably be defended in the light of the avowed purposes of the War Labor Disputes Act. Congress passed that law to apply to disputes arising during the war years. As indicated the War Labor Disputes Act provides for its own automatic repeal which is effective six months following the termination of hostilities of World War II, as proclaimed by the President, or upon the date of concurrent resolution of the two Houses of Congress invalidating the statute.⁹⁹ Whether or not the majority decision was justifiable in wartime appears to depend on the intent of Congress. As indicated, Congress evidently considered and rejected legislation which would have precluded the majority decision in the *Republic Steel* case. In fact, some of the members in Congress who championed the War Labor Disputes Act expressly stated that the legislation would not affect any right enjoyed by workers under the terms of the Wagner Act. On this basis the Board's decision appears to be consistent with the intent of the Congress of the United States.

Applicability of the Wagner Act to Seized Plants

Though the President of the United States had seized some war production plants under the authority of his constitutional war powers, the War Labor Disputes Act provided the President with the power to take

⁹⁷ *Ibid.*, p. 1038.

⁹⁸ *In the matter of Kalamazoo Stationery Company*, 66 N.L.R.B. (1946), 930, 931.

⁹⁹ War Labor Disputes Act, Sec. 10. It was already noted that President Truman on December 31, 1946, proclaimed World War II hostilities terminated. See *supra*, n. 57.

over any war plant or facility "for the use and operation by the United States."¹⁰⁰ In the event of such seizures, the Act further stated that no change in the terms of employment could take place without the express approval of the National War Labor Board.¹⁰¹ On this score the law provided that the representative of a majority of the employees of the plant might apply for changes in wages, or other terms and conditions of employment, and that any decision rendered by the N.W.L.B. would be binding on the federal agency operating the plant or facility.

Some employers attempted to utilize the fact of seizure of their plants to impair the power of the N.L.R.B. to certify collective bargaining agents within the seized properties. Employers are ordinarily expressly invited to attend those N.L.R.B. hearings conducted in order to determine bargaining representatives within their plants. Indeed, employers are invariably a party to a representation dispute and as such have in effect the statutory right to offer testimony at all N.L.R.B. hearings involving their employees.¹⁰² But in one case involving a seized plant, an employer contended that he was no longer the owner of the business inasmuch as the United States Army, acting under the orders of the President, had assumed control of the property.¹⁰³ Consequently the employer refused to attend or participate at a representation hearing alleging that "in view of the possession and control exercised by the United States Army over its plants and business operations, the Company was no longer the employer of the employees concerned and could not properly participate in the . . . proceeding."¹⁰⁴ By this device the employer probably attempted to forestall N.L.R.B. certification of his employees' union inasmuch as acceptance of his contention would recognize the United States government as the employer. If such a ruling were made, the N.L.R.B. could not properly assume jurisdiction because the National Labor Relations Act specifically excludes N.L.R.B. activities with respect to the employees of the United States government or of other political units.¹⁰⁵ Had the N.L.R.B. accepted the employer's position, the Board would have made it easier for some employers to forestall certification of their workers' unions. An employer, determined to prevent a certification, could accomplish his purpose by engaging in activities which would ultimately require seizure by the government of this plant. Widespread adoption of the practice could have seriously endangered the status of organized labor during the war period with likely resultant industrial strife and diminution of war production.

But the N.L.R.B. rejected the view of the employer pointing out that

¹⁰⁰ *Ibid*, Sec. 3. ¹⁰¹ *Ibid*, Sec. 5.

¹⁰² See National Labor Relations Act, Sec. 9 and 10.

¹⁰³ *In the matter of Ken-Rad Tube and Lamp Corporation*, 56 N.L.R.B. 1050 (1944).

¹⁰⁴ *Ibid.*, p. 1051.

¹⁰⁵ Sec. 2 of the National Labor Relations Act provides that the term "employer" does not "include the United States, or any state or political subdivision thereof."

the fact of seizure did not affect either a "company's ownership interest in its properties or the employment relationship between the company and its employees."¹⁰⁶ In the light of the provisions of the War Labor Disputes Act, the ruling of the Board appears to have ample legal validity. The Act provides for the return to the owners of the seized property within sixty days after the restoration of its productive efficiency prevailing before the seizure.¹⁰⁷ As such it seems that the government merely operates the war facility in trust temporarily for the private owners; and accordingly the Board ruled that the company and not the United States government was the employer of the workers involved in the representation dispute. Boycott of the representation hearings by the employer under such circumstances did not act as a bar to the certification hearings, and the N.L.R.B. proceeded in the case in its usual manner.

Though the conditions of employment could not be altered in a seized plant without prior approval by the National War Labor Board, this agency ruled that the limitation did not apply to the employees' right of choice of bargaining agent.¹⁰⁸ The War Labor Board declared that a contrary view could not be valid in view of the requirement that the policy and rulings of the N.W.L.B. be consistent with the terms of the National Labor Relations Act as administered by the N.L.R.B.¹⁰⁹ Consequently a labor organization representing employees in a seized plant which desired to submit a petition for certification to the N.L.R.B. was not required to obtain prior approval from the N.W.L.B. Certification of representatives by the N.L.R.B. did not constitute a change in the "terms of employment" within the meaning of the War Labor Disputes Act. Furthermore the N.L.R.B. could change the statutory bargaining representative in a seized plant without prior approval by the N.W.L.B.

As the N.W.L.B. constituted a government agency, this Board, of course, was not required to bargain with a majority labor organization in the manner required of a private employer. Nevertheless the N.W.L.B., in considering changes in terms of employment, did regard an N.L.R.B. certified union as the bargaining representative of the workers in the seized property.¹¹⁰ The N.W.L.B. pointed out that "while as a matter of

¹⁰⁶ *In the matter of Ken-Rad Tube and Lamp Corporation, op. cit.*, p. 1052.

¹⁰⁷ War Labor Disputes Act, Sec. 3. Moreover, Sec. 3 of the statute also provides for the return of all seized properties by the end of six months after the termination of hostilities, as proclaimed by the President. As noted, President Truman proclaimed World War II hostilities terminated on December 31, 1946. Accordingly all properties seized by the United States government under the terms of War Labor Disputes Act had to be returned to their private owners by July 1, 1947.

¹⁰⁸ "Bargaining After Plant Seizure," *Labor Relations Reference Manual*, vol. 15, p. 2579.

¹⁰⁹ See Executive Order 9017, dated January 12, 1942; Executive Order 9250, dated October 3, 1942; War Labor Disputes Act, Sec. 7(a)(2). All these measures require that N.W.L.B. orders must conform to the provisions of the National Labor Relations Act administered by the National Labor Relations Board. See chap. 7, for an analysis of the relationship between the N.W.L.B. and the N.L.R.B.

¹¹⁰ See War Labor Disputes Act, Sec. 5, which provides that "a majority of the employees of such plant . . . or their representative may apply to the National War Labor Board for a change in wages or other terms or conditions of employment in such plant, mine, or facility."

law a government agency operating a plant is not subject to the National Labor Relations Act, and might, therefore, be free of any statutory requirement to bargain collectively, yet the government's oft-repeated policy in support of collective bargaining makes it appropriate for the Board to recognize the right of a majority union to act as the representative of employees."¹¹¹ Furthermore the N.W.L.B. required a government agency operating a seized plant in which an N.L.R.B. certified union represented the workers to consult with such an organization before requesting changes in the facility's terms of employment. Thus an N.L.R.B. certification of a labor organization representing the employees of a seized plant had practical significance. As indicated, the N.W.L.B. recognized such a labor union as the bargaining representative of the employees of a seized plant, and, moreover, required federal agencies operating seized plants to consult with certified unions before requesting changes in seized plants' terms of employment.

¹¹¹ "Bargaining After Plant Seizure," *op. cit.*, p. 2580

Chapter 4

EFFECTS OF THE PRICE CONTROL PROGRAM

The Price Control Policy

During the war years Congress attempted to promote and maintain an orderly domestic economic system which would aid the national war effort through the enactment of legislation designed to prevent an inflationary spiral of prices. On January 30, 1942, the Emergency Price Control Act¹ was enacted which provided for the general control of prices over commodities. Prompted by the desire to bring wages under governmental regulation, Congress, in addition, on October 2, 1942, passed legislation which gave the power to the President to stabilize wages and salaries.² In turn, the President, on October 3, 1942, delegated the administration of the law to the National War Labor Board.³ For the first time in the history of the nation wages could not be increased without government approval even though an employer voluntarily agreed to the raise. Specifically the Executive Order of October 3, 1942, which implemented the Act of October 2, 1942, stated in part that "no increases in wage rates, granted as a result of voluntary agreement, collective bargaining, conciliation, arbitration, or otherwise, and no decrease in wage rates, shall be authorized unless notice of such increases or decreases shall have been filed with the National War Labor Board and unless the National War Labor Board has approved such increases or decreases." To provide for the enforcement of the wage control law, the Act of October 2, 1942, made an employer criminally liable for granting an unlawful wage increase.⁴

In order to discharge its wage control responsibilities the N.W.L.B. set up regional offices with the same duties and responsibilities as the National Board. The main wage stabilization functions of the N.W.L.B. and its regional offices were to pass judgment on all applications for wage increases in conformance with national wartime wage policy.⁵

¹ Emergency Price Control Act, 56 Stat. 23 (1942).

² Act of October 2, 1942, 56 Stat. 765.

³ Executive Order 9250, dated October 3, 1942. The National War Labor Board was originally established under Executive Order 9017, dated January 12, 1942, under which it was empowered to settle finally all labor disputes not falling within the exclusive jurisdiction of other federal labor agencies. Under the terms of the War Labor Disputes Act (57 Stat. 163) enacted on June 25, 1943, the War Labor Board received statutory authority for its operations. See chap. 7, for a general description of the work of the N.W.L.B.

⁴ Sec. 11 of the Act of October 2, 1942, provided that "any individual, corporation, partnership, or association willfully violating any provision of this Act, or any regulation promulgated thereunder shall, upon conviction thereof, be subject to a fine of not more than \$1,000 or to imprisonment for not more than one year, or to both such fine and imprisonment."

⁵ For an analysis of the policies established in this respect see E. B. McNatt, "Toward a National Wartime Labor Policy: The Wage Issue," *The Journal of Political Economy*, vol. 51, February, 1943, and his article "Wage Stabilization Policies of the National War Labor Board," *Opinion and Comment* (Bureau of Economic and Business Research, University of Illinois), vol. 41, February 8, 1944. McNatt served as Director of the Wage Stabilization Division of the Sixth Regional Office of the N.W.L.B. during the war years.

Provisions Relating to the N.L.R.B.

In the preamble of the Emergency Price Control Act of January 30, 1942, Congress directed several federal agencies, including the N.L.R.B., to work within the limits of their jurisdiction and authority toward a stabilization of prices, fair and equitable wages, and cost of production.⁶ A close inspection of the text of the mandate reveals that its injunction as far as it applied to the N.L.R.B. appears rather vague and uncertain. As was commonly recognized, the Office of Price Administration was to be the primary enforcement agency of the price control statute. Students of the Wagner Act will quickly realize that the N.L.R.B. could do comparatively little towards the implementation of the nation's wartime price control program. Apart from this rather ambiguous statement embodied in the Emergency Price Control Act, all other references to the N.L.R.B. contained in subsequent price control laws and executive orders, rather than placing a positive mandate on the Board to effectuate the price control program, carefully restricted the application of those laws and executive orders insofar as they might affect the provisions of the National Labor Relations Act.

Thus Section 4 of the Act of October 2, 1942, provided that no action was to be taken under the terms of that Act "with respect to wages or salaries which (was) inconsistent with the provisions of the National Labor Relations Act." A study of the legislative history of the Act of October 2 indicates that Section 4 was apparently included to prevent the National War Labor Board from withdrawing the issue of wages from the area of collective bargaining. Though wage increases could not be awarded without the approval of the N.W.L.B., Section 4 of the wage control law insured that union representatives could still negotiate with employers over the issue of wages. On this point, Senator Brown of Michigan, defending the wage control bill before Congress, stated that "Section 4 . . . preserved for labor the right of collective bargaining contained in the National Labor Relations Act."⁷

Accordingly the N.L.R.B. ruled that an employer could not point to the wage control act as defense for not bargaining with the representatives of his employees over the subject of wages.⁸ In rejecting such a contention, the N.L.R.B. declared in one case that an employer violated the Wagner Act "by failing to bargain in good faith with respect to the wage

⁶ 56 Stat. 23 states: ". . . It shall be the policy of those departments and agencies of the government dealing with wages (including the Department of Labor and its various bureaus, the War Department, the Navy Department, the War Production Board, the National Labor Relations Board, the National Mediation Board, the National War Labor Board and others heretofore and hereafter created) within the limits of their authority and jurisdiction to work toward a stabilization of prices, fair and equitable wages, and cost of production."

⁷ National Labor Relations Board, *Decisions and Orders* (1944), vol. 55, p. 1308.

⁸ *In the matter of Ideal Leather Novelty Company*, 54 N.L.R.B. 761 (1944).

increases which were subject to N.W.L.B. approval.”⁹ Though the N.L.R.B. recognized the fact that any eventual wage agreement arising from the negotiations of the employer and the labor organization would be subject to the ultimate approval by the N.W.L.B., the N.L.R.B. nonetheless found that failure to bargain over wages constituted an unfair labor practice within the meaning of the Wagner Act. Further evidence in the instant case revealed that the employer was not coerced by the union to grant a wage increase prior to N.W.L.B. action, but that the union merely desired to establish a mutual plane of understanding with respect to wage rates. After that was accomplished, the matter, of course, would have to be referred to the National War Labor Board.

Additional references to the N.L.R.B. were contained in Executive Order 9017, which established the N.W.L.B., and in Executive Order 9250, which implemented the Wage Control Act of October 2, 1942. Both of these executive orders contained the Presidential injunction that no decision rendered by the N.W.L.B. could conflict with the rulings of the N.L.R.B.¹⁰ Thus it appeared as though the President and the Congress, while providing for a wartime price control program, endeavored to preserve intact all rights afforded workers under the terms of the National Labor Relations Act. Such safeguards were apparently embodied in price control legislation and in price control Executive Orders in order to insure the nation's wartime employees that their Wagner Act rights were not to be diluted under the pretext of war expediency. Both the Congress and the President evidently believed that an effective wartime price control program could be implemented without compromising the provisions of the National Labor Relations Act.

The American News Case

In view of these considerations, one might have reasonably concluded that the N.L.R.B. had the same degree of authority after the establishment of the national price control program as the Board possessed before its institution. Despite the apparent intent of the President and of the Congress, the National Labor Relations Board in one of its most important wartime decisions ruled, in a split opinion,¹¹ that employees who engaged in a strike to compel an employer to violate the Wage Stabilization Act of October 2, 1942, lost all rights under the National Labor

⁹ *Ibid.*, p. 778.

¹⁰ Executive Order 9250, dated October 3, 1942, states under Title IV, that “nothing in this Order shall be construed as affecting the present operation of the . . . National Labor Relations Board”; Executive Order 9017, dated January 17, 1942, provides in par. 7 that “nothing herein shall be construed as superseding or in conflict with the provisions of . . . the National Labor Relations Act”; when the War Labor Disputes Act (57 Stat. 163) was enacted on June 25, 1945, that law in Sec. 7(a)(2) similarly enjoins the National War Labor Board from rendering decisions not in conformance with the provisions of the National Labor Relations Act.

¹¹ Board Member Reilly and Board Member Houston constituted the majority. Chairman Millis dissented.

Relations Act.¹² Specifically the workers struck to force an employer to grant a wage increase without National War Labor Board approval. Should the employer have complied with the union's demand and granted the wage increase he would have been criminally liable under the terms of the wage stabilization law. Unlike the circumstances involved in the *Ideal Leather Novelty* case,¹³ the employer, in the instant case, cooperated in every respect with the union in the attempt to secure the necessary approval from the N.W.L.B. to grant a legal increase in wages. The undisputed facts in the matter revealed that about October 15, 1942, the union and the employer agreed to a wage increase for the members of the union. In accordance with instructions from a regional office of the National War Labor Board, the employer filed a proper application for approval to grant the wage increase. This request, however, was subsequently denied by the National War Labor Board. Again on April 2, 1943, the employer and the union submitted another joint application for a wage increase. Facts indicated that by June 10, 1943, the N.W.L.B. had not taken any action on this second application. It was agreed by the union that in the entire negotiations before the N.W.L.B. the employer "cooperated with the Union and took whatever steps were deemed necessary in order to secure approval of the wage increases."¹⁴

Nonetheless the union held a meeting on June 10, 1943, and its members collectively decided to strike unless the company at once granted the proposed wage increase. Such a request was, of course, immediately refused by the company, and the employees struck the following day. It should be clearly noted that there was no dispute between the labor organization and the employer with respect to the amount of the wage increase. Instead the only dispute involved the fact that the employer, to protect himself from criminal liability, refused to grant the wage increase prior to its approval by the National War Labor Board. The labor organization called a strike wholly beyond the control of the employer. Clearly this kind of a strike can scarcely be defended.

On the day of the strike, the employer sent notices to the men on strike that their services were terminated as of June 10, 1943, and that they were consequently no longer in the employment of the company. But on June 21, 1943, the union members decided to return to work, and requested reinstatement. The company refused to reinstate the workers claiming that they were no longer considered as workers of the plant. It is extremely important to note that the employer's refusal to reinstate the workers was not based on the fact that their jobs had been filled

¹² *In the matter of American News Company, Inc.*, 55 N.L.R.B. 1302 (April 14, 1944).

¹³ 54 N.L.R.B. 761. See *supra*, n. 8.

¹⁴ *In the matter of American News Company, Inc.*, *op. cit.*, p. 1305.

prior to the date on which they requested reinstatement.¹⁵ If their positions had been filled, the N.L.R.B. under no consideration could have ordered their reinstatement. Instead, the employer refrained from reinstating the employees on the ground that they severed employment with him, and that by engaging in an unlawful strike, they forfeited all their rights under the National Labor Relations Act. He claimed that the purpose of the strike was illegal because it was effected to force him to violate a federal statute. On the other hand, the union claimed that the employees engaged in a "concerted activity" protected under the terms of the Wagner Act.¹⁶ In examining the question, the N.L.R.B. stated that the issue had to be decided on the basis of "whether the strike, standing by itself, was the kind of collective activity protected by Section 7."¹⁷ If the strike were ruled a concerted activity safeguarded by the Wagner Act, the N.L.R.B. would direct the employees reinstated; but if the strike were ruled as an activity not within the protective scope of the law, the employer would not be compelled to reinstate the workers.

A survey of the N.L.R.B. rulings reveals that the Board has not ordered the reinstatement of employees who have engaged in unlawful conduct. Employees who were charged with felonies, such as dynamiting¹⁸ or murder,¹⁹ forfeited all rights under the National Labor Relations Act. Similarly the Board has ruled that employees who commit serious misdemeanors lost their reinstatement rights under the Act. Examples of such conduct include engaging in serious assault and battery, threatening to burn a plant, or filing a baseless charge against a superintendent for assault and battery with intent to kill.²⁰ Such activities engaged in by employees while on strike or committed independent of work stoppages would preclude any protection afforded by the Wagner Act. Similarly, the Supreme Court has ruled that workers engaging in a "sit-down strike"²¹ or who commit mutiny in violation of the Admiralty Laws²² forfeit their rights under the National Labor Relations Act. Although

¹⁵ If the jobs had been filled, the employees could not seek relief under terms of the Wagner Act. The Supreme Court ruled in *N.L.R.B. v. Mackay Radio and Telegraph Company*, 304 U.S. 33 (1938), that employees who engage in a purely economic strike, such as in the instant case, have no absolute right to their jobs. If their positions are filled while they are on strike, the N.L.R.B. has no authority to order their reinstatement. Only when a strike is caused by an unfair labor practice, can the N.L.R.B. order an employer to reinstate the strikers even though their jobs may have been taken by replacements. See *In the matter of Biles-Coleman Lumber Company*, 4 N.L.R.B. 679 (1937), enforced 98 Fed. (2d) 18 (CCA-2, 1938). In the *American News* case, the union did charge an unfair labor practice, but the evidence wholly discredited the allegation.

¹⁶ National Labor Relations Act, 49 Stat. 449, Sec. 7, states that "employees shall have the right to self-organization . . . to bargain collectively through representatives of their own choosing, and to engage in concerted activities."

¹⁷ *In the matter of American News Company, Inc.*, op. cit., p. 1307.

¹⁸ *In the matter of Standard Lime and Stone Company*, 5 N.L.R.B. 106 (1938).

¹⁹ *In the matter of Kentucky Firebrick Company*, 3 N.L.R.B. 455 (1937).

²⁰ *In the matter of Republic Creosoting Company*, 19 N.L.R.B. 267 (1940).

²¹ *N.L.R.B. v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939).

²² *Southern Steamship Company v. N.L.R.B.*, 316 U.S. 31 (1942).

these examples of unlawful employee conduct involve varied patterns, they all possess one common characteristic. They all demonstrate that the N.L.R.B. will consider the conduct of employees while on strike before ordering their reinstatement. Workers who engage in such unlawful activities while on strike place themselves beyond the pale of the protective features of the law. The point to be emphasized, however, is that the Board in those cases did not consider the purpose or the objectives of the strikes, but merely ruled that employees who committed flagrantly unlawful acts while on strike lost their rights under the Wagner Act.

In the *American News Company* case, however, the facts indicated that the striking employees did not engage in any unlawful conduct while on strike. They carried out the strike in a peaceful and lawful manner. Notwithstanding this fact, the majority of the Board in the celebrated *American News* decision ruled that employees forfeited their rights under the National Labor Relations Act because the purpose of their strike was illegal. It was an unlawful strike because it was carried out to coerce an employer to violate a federal statute. The decision is of great importance because the N.L.R.B. for the first time since its creation looked to the objectives of a strike for the controlling basis of a decision. Though in the past employees' specific acts of unlawful conduct resulted in the forfeiture of Wagner Act rights, the N.L.R.B. in the instant case refused the protection of the law to employees who engaged in an alleged unlawful strike. In this connection, the N.L.R.B. stated that it was untenable "to hold all collective activity, whatever its objective, within the protection of the Act."²³ Under this interpretation, the N.L.R.B. established the principle that employees who engage in unlawful strikes could lose all rights afforded by the Wagner Act even though the strike be carried out in a lawful and peaceful manner.

In support of its position, the majority of the Board in part pointed to the rulings of the Supreme Court in the *Southern Steamship* and *Fansteel* decisions. It was the N.L.R.B. contention that the Supreme Court precluded the application of the Wagner Act in those cases because the 'employees' strikes were unlawful in themselves and not because of any felonies or misdemeanors committed by individual workers.²⁴ Furthermore, the Board's majority members believed that the legislative history of the Wagner Act sustained its view. During the Congressional debate on the National Labor Relations Act, according to the Board, "no witness . . . limited his suggestions to the single proposal that the bill explicitly deny protection to employees guilty of seeking to coerce employers into

²³ *In the matter of American News Company, Inc*, op cit, p. 1313.

²⁴ *Ibid*, p. 1309.

performing an unlawful act."²⁵ As Congress had no opportunity to reject such a proposal, the Board believed that Congress in effect intended the N.L.R.B. to deny the law's protection to employees who strike to compel an employer to commit an illegal act. Finally, the majority of the Board pointed to the preamble contained in the Act of January 30, 1942.²⁶ It was the belief of the Board that Congress by virtue of the preamble placed a mandate on the N.L.R.B. to preclude the application of the Wagner Act to employees who engaged in a strike to compel a violation of the Wage Stabilization Act of October 2, 1942. In this connection, the majority members declared that the conclusion was "inescapable that the Act of October 2, 1942, [was] precisely the type of legislation which Congress intended to be taken into consideration in applying the provisions of the National Labor Relations Act."²⁷

As noted above, Congress, while enacting the Act of October 2, 1942, provided that no action should be taken under the law's authority inconsistent with the provisions of the Wagner Act,²⁸ and that the Executive Order implementing the statute stated that nothing in the Order should be construed as affecting the operation of the National Labor Relations Board.²⁹ In the light of these facts, the majority's interpretation of the wage control law and Executive Order might be questioned. It appears that the preamble of the Act of October 2, 1942, obligating several government agencies, including the N.L.R.B., to provide for "fair and equitable wages" is vague and uncertain and loses much of its force (as far as the preamble applies to the N.L.R.B.) when considered in the light of the specific injunctions of Congress and the President which protect the provisions of the National Labor Relations Act from possible dilution by the operation of the wage control program.

Millis, in his dissenting opinion, stressed the fact that the majority decision was not rendered in accord with the wartime federal labor policy. Had Congress intended to preclude the application of the Wagner Act under the circumstances presented in the *American News* case, Millis contended that an appropriate provision would have been included in the Act of October 2, 1942, or in the National Labor Relations Act itself. By omitting any such reference, Millis pointed out that "neither the President nor Congress [had] been willing to annul or abridge the fundamental substantive rights that workers enjoy under existing Federal labor laws."³⁰ The Chairman of the Board considered the majority's decision particularly objectionable because Reilly and Houston limited the application of the

²⁵ *Ibid.*, p. 1310. ²⁶ See *supra*, p. 88, n. 6.

²⁷ *In the matter of American News Company, Inc.*, *op. cit.*, p. 1312.

²⁸ See *supra*, p. 88. ²⁹ See *supra*, p. 89, n. 10.

³⁰ *In the matter of American News Company, Inc.*, *op. cit.*, p. 1319.

Wagner Act in a manner apparently not intended by Congress or by the President.

Though Millis deplored the action of the union, he nevertheless contended that the majority decision was inconsistent with the legislative history of the Wagner Act. On this score, there is evidence that Congress, while debating the Wagner Act, rejected an amendment which would have prohibited the application of the law to employees who violated another federal law. The House of Representatives on June 19, 1935, rejected such a proposal. The amendment provided in part that a labor organization or its members would be excluded from the scope of the Wagner Act if the union were to "instigate, maintain, or support any strike for an illegal purpose"; or if a labor organization were to "instigate, maintain, or support any strike designed or calculated to coerce government or any agency thereof either directly or by inflicting hardship on the community, against any action on the part of the State, or Federal government, or on any of the agencies, or political subdivisions thereof."³¹ As noted, the majority decision in the *American News* case was supported, in part, by reference to the legislative history of the Wagner Act. Thus as "no witness . . . limited his suggestions to the single proposal that the bill explicitly deny protection to employees guilty of seeking to coerce employers into performing an unlawful act,"³² the Board's majority members believed that Congress did not reject an amendment which would have precluded the operation of the Wagner Act in the *American News* matter. It appears that Congress discarded such a possible limitation of the law and much more when it refused to enact the above cited amendment.

The majority members were, of course, correct in administering the Wagner Act in the light of war conditions. Though Chairman Millis dissented from the majority, he also was aware of the necessity of promoting uninterrupted wartime production. Millis further recognized the need of adapting Wagner Act policies to wartime conditions. However, the Board's wartime chairman refused to compromise the National Labor Relations Act's substantive provisions. His problem, therefore, was to discourage the *American News* type of strike without weakening the Act's protective features. To accomplish this objective, Millis would have reinstated the strikers but without back pay. In this connection, Millis declared that "by denying them back pay, this Board would serve notice that employees engaging in strikes of this kind forfeit wages that would otherwise accrue following a denial of their request for reinstatement. Such a ruling would obviously tend to discourage work stoppages of this character."³³ Thus Millis would have held the right of employees to strike

³¹ *Congressional Record*, June 19, 1935, vol. 79, p. 9721.

³² See *supra*, p. 93, n. 25.

³³ *In the matter of American News Company, Inc*, *op. cit.*, p. 1320.

under the terms of the Wagner Act invulnerable,³⁴ and yet effectuate the principles of the Wagner Act in the light of war conditions by reinstating the workers without back pay. In this manner, the Board, according to Millis, would not be compelled to give attention to the "legality-of-purpose" of the strike.

This "legality-of-purpose" reference which was employed by the majority greatly disturbed Millis and some students of labor relations. Much progress has been made in the law of labor relations since the time when all unions and all strikes were considered a conspiracy and unlawful.³⁵ Social thinking as expressed in labor legislation and in court decisions has greatly widened the permissible scope of legitimate labor organization activities. It is stressed in this connection that the Norris-LaGuardia Act³⁶ was enacted to prohibit the federal courts from deciding whether certain labor activities are unlawful. Consequently, Millis was deeply concerned with the *American News* decision because the majority members based their ruling on the alleged illegality of the strike. He declared in this respect that he thought "with the passage of the Norris-LaGuardia Act and the National Labor Relations Act . . . that this dangerous touchstone had at last been banished from the Federal law pertaining to labor relations."³⁷ Millis apparently feared that the rule of the majority might provide the precedent for the subjecting of a wide variety of employee activities to the test of "legality-of-objective" with the possible resultant weakening of protective labor laws.

A case arising only a few months after the *American News* decision in part justified his fear. Evidence in the later case³⁸ proved that a group of employees struck because an employer would not agree to a proposed wage increase. Unlike the facts in the *American News* case, the employees in the instant case did not strike to force an employer to *grant* the increase, but struck merely to prompt him to *agree* to the wage adjustment so that the matter could be presented to the National War Labor Board for approval. Differentiating the case from the *American News* doctrine, the N.L.R.B. directed the employer to reinstate the striking employees. It declared that the strike in the instant matter arose out of "the [employer's] unwillingness to agree to the employees' request for wage increase" and not of "an unlawful demand that agreed wage increases be put into effect prior to approval by the War Labor Board."³⁹ In effect, the Board ruled that wage controversies were still a matter for collective bar-

³⁴ It should be stressed in this respect that Sec. 13 of the National Labor Relations Act provided that "nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike"

³⁵ See *Commonwealth of Massachusetts v. Hunt*, Massachusetts, 4 Metcalf 111 (1842).

³⁶ 47 Stat. 70. ³⁷ In the matter of *American News Company, Inc.*, *op. cit.*, p. 1319.

³⁸ In the matter of *Indiana Desk Company*, 58 N.L.R.B. 48 (1944). ³⁹ *Ibid.*, p. 49.

gaining, and strikes arising from the negotiations for wage increases were still within the Wagner Act's scope of legitimate "concerted activities."⁴⁰ Thus the N.L.R.B. declared a strike was unlawful with respect to the wartime wage control program only when the employees involved demanded that the employer grant an increase prior to approval by the National War Labor Board.

However, when the employer appealed the *Indiana Desk* case to a federal court, the court found no basis for differentiating the instant matter from the *American News* doctrine. In overruling the N.L.R.B., the court declared that "the Board's reasoning in the *News* case is sound and that it is equally applicable to the instant situation . . . we are unable to discern what difference it makes whether the pressure placed upon the employer is exerted before he agrees to an increase in wages or afterwards."⁴¹ The court utilized the opening provided by the N.L.R.B., in the *American News* case to limit further the application of the provisions of the Wagner Act. It is of importance to note that the court's decision in the *Indiana Desk* case rested on the touchstone provided by the N.L.R.B. Consequently the area of trade union activities was circumscribed by the "legality-of-objective" test introduced by the N.L.R.B. into the body of interpretation of the National Labor Relations Act. The *American News* doctrine, established during World War II, may seriously limit the degree of protection afforded employees by the N.L.R.B. in the postwar period.

⁴⁰ A similar rule was rendered by the Board in *the matter of Union Buffalo Muls Company*, 58 N.L.R.B. (1944), 384, 387 in which the N.L.R.B. declared that the employees, unlike the *American News* workers, went "on strike to compel negotiations of their wage demands and not for wage increases without the approval of the N.W.L.B." Also see *In the matter of Rockwood Stove Works*, 63 N.L.R.B. 1297 (1945), decided by the N.L.R.B. after the termination of the war, in which the Board ruled that a strike did not violate the Wage Control Act when other causes besides wages effected the strike, and where there was no conscious design on the part of the strikers to compel the employer to violate the Act of October 2, 1942. Chairman Herzog, who replaced Millis on July 5, 1945, and Board Member Houston rendered the majority opinion. Reilly dissented claiming the *American News* decision was controlling. In a 1947 case, however, the Board used the doctrine established in the *American News* case to deny a group of workers the benefits of the National Labor Relations Act. The N.L.R.B. ruled in the 1947 case that employees who participated in a strike, the purpose of which was to compel an employer to recognize and bargain with the union of striking employees rather than with a certified labor organization, were not entitled to reinstatement or to back pay. Since the purpose of this strike was deemed unlawful, the strikers lost all benefits of the Wagner Act. In reaching this decision, the Board declared that "the doctrine laid down in the *American News* case is applicable to such a situation." See *In the matter of Thompson Products, Inc.*, 72 N.L.R.B. (1947), 887, 888. It might be added that strikes of the *Thompson Products* type are unlawful under the terms of the Labor-Management Relations Act, 1947, Sec. 8 (b) (4).

⁴¹ *N.L.R.B. v. Indiana Desk Company*, 149 Fed. (2d) 987, 992 (CCA-7, 1945).

Chapter 5

NEW DUTIES UNDER THE TELEGRAPH MERGER ACT

Provisions Affecting the Board

To provide for the consolidation of the Western Union Telegraph Company and the Postal Telegraph Company, Congress, on March 6, 1943, enacted an amendment to the Communications Act of 1934 which facilitated the proposed merger.¹ As the amendment required the approval of the Federal Communications Commission before actual consolidation could be effected, the two companies involved, on May 25, 1943, submitted a petition to the F.C.C. for the necessary permission. On September 28, 1943, the F.C.C. approved the plan for the consolidation and on October 7, 1943, the properties were merged. In the consolidation, the Western Union Telegraph Company purchased the properties and other assets of the Postal Telegraph Company.²

While authorizing the consolidation of the Western Union and Postal Telegraph facilities, Congress, in order to insure the carrier's employees with a measure of job and compensation security, provided the telegraph industry workers with a series of minimum employment rights.³ Specifically, employees with service beginning before March 1, 1941, could not be discharged without their consent or suffer a reduction in compensation for a period of four years from the date of the approval of the merger. Such employees, furthermore, could not be employed in any position as a result of the merger inconsistent with their training and experience in the telegraph industry. Employees with service commencing subsequent to March 1, 1941, were entitled to severance pay if discharged because of the consolidation and were given the right to a preferential hiring status. If an employee, as a result of the merger, were to be transferred from one city to another, the company was required to pay traveling expenses for the worker and his family. The consolidated company was further directed to award to each employee the same pension rights, and health, disability, or life insurance benefits that he may have possessed before the merger. Any employee inducted into the armed services was entitled to re-employment after his discharge from the service, provided he made application for his position within forty days from the time of separation from the service. In addition, no employee, without his consent, could be discharged, furloughed, or suffer a reduction of wages for a period of six months before approval of the merger. Finally, all em-

¹ Telegraph Merger Act, 57 Stat. 5.

² National Labor Relations Board, *Eighth Annual Report* (1943), p. 80.

³ Telegraph Merger Act, Sec. 222(f).

ployees were to retain any rights to which they might be entitled under existing collective bargaining contracts for the duration of the agreement.

To implement these rights, Congress charged the N.L.R.B. with the responsibility for their enforcement. Under the terms of the Telegraph Merger Act employees affected by the consolidation are entitled to the same remedies as are provided to employees covered by the terms of the National Labor Relations Act. Violations of the rights guaranteed to employees affected by the merger are to be enjoined by the N.L.R.B. in the same manner as the Board would order an employer to take corrective action in a Wagner Act unfair labor practice case. The Telegraph Merger Act provides that "for purposes of enforcement or protection of rights, privileges, and immunities granted or guaranteed under this subsection, the employees of any such consolidated or merged carrier shall be entitled to the same remedies as are provided by the National Labor Relations Act in the case of employees covered by that Act."⁴ Furthermore the N.L.R.B. was empowered to resort to the courts to enforce any order that the agency may render to protect employees in their rights guaranteed by the Telegraph Merger Act.⁵

Because of these new duties the N.L.R.B. amended its rules of procedure to accommodate the added responsibilities.⁶ In effect, the Board construed the denial of rights afforded to the employees of the consolidated carrier as an unfair labor practice.⁷ Should the carrier deny to an employee any of the rights guaranteed under the Telegraph Merger Act, the Board was prepared to institute the same course of action utilized in dealing with unfair labor practice cases arising under the Wagner Act. An alleged charge would be investigated and, if necessary, the Board would issue the familiar complaint directing a formal hearing in the matter. Finally, an "Intermediate Report" would ordinarily be rendered on the basis of the hearing, which would partly provide the foundation for any subsequent N.L.R.B. decision and order.

Influence of Act on Board's Operations

From October 7, 1943, the date of the actual merger of the telegraph properties, until November 1, 1944, the N.L.R.B. received only eighteen charges alleging violations of the rights guaranteed to the employees of the carrier.⁸ Only one complaint was issued by the N.L.R.B. during this period. Similar to its policy established for Wagner Act unfair labor practice cases, the Board encouraged the informal settlement of issues arising

⁴ *Ibid.*, Sec. 222(f) (10)

⁵ National Labor Relations Board, *Ninth Annual Report* (1944), p. 74.

⁶ National Labor Relations Board, *Rules and Regulations*, Series 3, November 26, 1943.

⁷ *Ibid.*, Article X, Sec. 1, states that the term "unfair labor practices" as utilized under the terms of the Wagner Act shall mean the "denial of any rights, privileges, or immunities granted or guaranteed under Sec. 222(f) of the Communications Act of 1934, as amended."

⁸ National Labor Relations Board, *Ninth Annual Report* (1944), p. 75.

under the Telegraph Merger Act. In the fiscal year 1945, only fifteen charges were filed with the Board complaining of violations of the Telegraph Merger Act, and only one complaint was issued by the Board.⁹

One charge received by the N.L.R.B. alleged that the Western Union attempted to terminate a death-benefit plan enjoyed by the former Postal Telegraph workers. Upon investigation of the case, the Board agents brought about a quick settlement of the case in which the company not only voluntarily continued the death-benefit plan, but even opened its benefits to other employees.¹⁰ In another case a charge was filed alleging that an employee was demoted in violation of the statute. Again informal disposition of the case was made, and the company promoted the employee to his former position, and paid him the difference in wages which he lost because of the demotion. As noted only one case went to a formal hearing during the fiscal year 1945. In this matter an employee was found to be discharged in violation of the Telegraph Merger Act. After an N.L.R.B. trial examiner issued his "Intermediate Report," the company made a cash adjustment to the employee and otherwise effected compliance with the law.¹¹

Thus, the influence of the Telegraph Merger Act on the operations of the N.L.R.B. was much smaller than that of the amendments of Appropriation Acts and the responsibilities in connection with strike votes. Beyond altering its rules to accommodate the new duties, and with the exception of disposing of the small number of cases arising under the Telegraph Merger Act, the Board's activities were only slightly diverted from its task of administering the National Labor Relations Act.

The Western Union Representation Case

Of larger social significance than the N.L.R.B. enforcement duties under the terms of the Telegraph Merger Act was the problem of the certification of the bargaining agent of the consolidated company's employees. Before the merger, a C.I.O. union possessed a closed shop contract with the Postal Telegraph Company covering approximately 15,000 employees. In addition the C.I.O. affiliate had another contract with the Western Union Company covering about 10,000 of the company's workers.¹² In all, the Western Union Company employed approximately 61,254 workers. Apart from the workers represented by the C.I.O. union, the other employees of the Western Union Company were represented by A.F.L. affiliates.

After the consolidation of the two telegraph carriers, the N.L.R.B. faced the extremely delicate problem of certifying the union which would

⁹ National Labor Relations Board, *Tenth Annual Report* (1945), p. 78.

¹⁰ National Labor Relations Board, *Ninth Annual Report* (1944), p. 75.

¹¹ National Labor Relations Board, *Tenth Annual Report* (1945), p. 78.

¹² Bureau of National Affairs, *War Labor Reports*, vol. 13, p. 299.

represent the employees of the unified company. Prior to the merger, as noted, A.F.L. unions bargained for a large share of the Western Union employees while the C.I.O. union had a closed shop contract covering all the Postal Telegraph workers. But another factor which further complicated the matter was the fact that the carrier's operations were flung throughout the length and breadth of the nation. This situation obviously complicated the Board's problem of designating the appropriate bargaining unit in which to hold a subsequent representation election. If the N.L.R.B. selected a system-wide bargaining unit, the A.F.L. would easily emerge the winner because of its strength among the Western Union workers. If the C.I.O. affiliates were to be successful, the N.L.R.B. would be compelled to "gerrymander" the entire nation to isolate units in which the C.I.O. union would have the greater strength. As can be expected, the positions of the two rival unions stemmed from their relative tactical positions. Accordingly, the A.F.L. urged the N.L.R.B. to adopt a system-wide unit while the C.I.O. argued that the Board should designate 105 separate bargaining units in which to hold elections.¹³ It is noteworthy that the rival unions were urging bargaining units in this matter unlike their traditional positions. The issue of craft unit against industrial unit as customarily propounded by the A.F.L. and the C.I.O. was subordinated to opportunistic considerations which would lay the basis for victory in an eventual election.

When the case was finally decided the N.L.R.B. rejected both extreme positions, and set up seven bargaining units which followed the geographical division of the company's operations.¹⁴ In rendering the decision, the majority of the Board¹⁵ declared that "it is found that a nation-wide election should not be held at this time, as requested by the A.F.L. and the Company. Both vertically and horizontally, the unit they seek is of the widest scope: it covers all the company's departments, and it covers the country. The time since merger is too recent, conditions too unsettled and abnormal to declare now as most appropriate a unit which tends to finality. It is further found, however, that it would be improper to limit the unit to districts and divisional cities as requested by the [C.I.O.]. Neither of the extremes is warranted by the facts as they presently exist."¹⁶

The most extensive geographical election conducted by the Board since

¹³ "The Unit Dilemma in Western Union Case," *Labor Relations Reporter*, July 31, 1944, vol. 14, p. 673.

¹⁴ *In the matter of Western Union Telegraph Company*, 58 N.L.R.B. 1283 (1944).

¹⁵ Millis and Houston were in the majority, and Reilly dissented. The chief point in Reilly's dissent was the fact that the Board set up a system-wide bargaining unit for the former Postal Telegraph Company when that issue was earlier presented to the Board. He said in this connection that unless the Board was "to ignore our past precedents and the repeated statements in our Annual Report with respect to our policies in the communications industry, as well as what seems to be the clear intent of Congress," the Board was compelled to find a system-wide unit as the appropriate one.

¹⁶ *In the matter of Western Union Telegraph Company*, p. 1297-11A.

its creation was subsequently held on the basis of the seven bargaining units designated as appropriate. As there existed approximately 19,000 Western Union offices, the Board ordered eighty elections to be held in the larger cities. Employees in the smaller cities and in outlying districts were given the privilege of voting by mail. All votes were to be tabulated in Washington.¹⁷ When the votes were finally counted, the results proved the A.F.L. affiliates to be the victor in all divisions with the exception of the New York district.¹⁸

In view of the complexity of the case, however, the N.L.R.B. took an unprecedented move, and secured a pledge from the rival unions to refrain from inter-union conflicts. Upon the request of the Board both the C.I.O. and A.F.L. affiliates signed an agreement on February 13, 1945, which provided that each union agreed to represent all employees fully and fairly without regard to C.I.O. or A.F.L. membership; to admit rival union members to membership without discrimination; and to recognize the right of the majority union to represent all employees.¹⁹ Beyond the statutory requirement of certifying the bargaining agents, the N.L.R.B. effected a "peace pact" to forestall any possible jurisdictional conflicts. In this respect the N.L.R.B. was conscious of the obvious "national importance of the telegraph industry"²⁰ when it encouraged the rival unions to pledge that no industrial strife would result from the certification of bargaining agents.

During the war years, a jurisdictional strike in the telegraph industry could easily have proved catastrophic. It was, therefore, fortunate that the representation dispute was settled through the election machinery of the N.L.R.B. This case illustrates one instance in which the National Labor Relations Board made an important positive contribution to the nation's war effort.

¹⁷ "Western Union Elections Announced for January, 1945," *Labor Relations Reporter*, December 11, 1944, vol. 15, p. 429.

¹⁸ *Labor Relations Reporter*, February 19, 1945, vol. 15, p. 821.

¹⁹ "Western Union Labor Pact," *Labor Relations Reporter*, February 19, 1945, vol. 15, pp. 821-22.

²⁰ *Ibid.*, p. 822.

PART II

Relationship of the Board to Federal Labor Agencies

Chapter 6

RELATIONSHIP TO THE NATIONAL DEFENSE MEDIATION BOARD

Purpose of the Board

Many months before the attack on Pearl Harbor, the United States instituted an all-out defense production program. To free defense industries from labor strife, the President, on March 19, 1941, by Executive Order,¹ established the National Defense Mediation Board. Under the terms of the Order, the President appointed the Board's eleven members. Employers and employees were each represented by four members, and three sought to protect the public's interests.

Only when the Secretary of Labor certified that the United States Conciliation Service was unable to effect a settlement in a labor dispute affecting a defense industry was the controversy to be referred to the National Defense Mediation Board. In general the National Defense Mediation Board was obligated to make every effort to adjust and settle any labor dispute which threatened to interfere with the defense production program. For this purpose the Board was directed to offer the parties mediatory services and to afford them the necessary means for voluntary arbitration. Finally the N.D.M.B. was empowered to investigate labor controversies, conduct hearings, make findings as to fact, formulate recommendations, and make public any of its recommendations. The N.D.M.B. had more authority than possessed by the usual mediation or conciliation agency. On the other hand, with the exception of those recommendations enforced by the President, its decisions were not binding on the participants to a dispute.² During its operation, the National Defense Mediation Board took action in 118 cases, involving 1,191,664 workers, of which the Board settled 96.³ As cases reached the N.D.M.B. only after the United States Conciliation Service failed to effect settlements, the record of the N.D.M.B. appears excellent. Actually, of the 118 disputes certified to the Board, 75 per cent of them involved existing strikes at the time when the N.D.M.B. took jurisdiction of the disputes.⁴ Despite this successful record, the N.D.M.B. was dissolved upon the outbreak of actual

¹ Executive Order 8716.

² See United States Labor Statistics Bureau, *Bulletin 714, Report on the Work of the National Defense Mediation Board, March 19, 1941-January 12, 1942*, p. 14. Actually the President enforced only three of the N.D.M.B. recommendations by seizing the properties of the affected companies. In the *North American Aviation* dispute, a union called a strike during the mediation process in violation of an agreement with the Board. The U.S. Army seized the plant. When the Federal Shipbuilding and Dry Dock Company refused to accept the recommendations of the National Defense Mediation Board, the President ordered the U.S. Navy to seize the plants and operate them for the government. Finally in the celebrated "captive mines" dispute, the President's recommendation of arbitration was accepted by the parties to the dispute. In this case, the Congress of Industrial Organizations members of the N.D.M.B. had previously resigned because of dissatisfaction with an award of the Board involving the closed shop.

³ *Ibid.*, p. 2.

⁴ *Ibid.*, p. 8.

hostilities, and was replaced by the more powerful National War Labor Board.⁵

The Jurisdictional Problem

Under the terms of the Executive Order establishing the National Defense Mediation Board, the agency was empowered to aid in the settlement of any controversy or dispute between management and labor which threatened "to burden or obstruct the production or transportation of equipment or material essential to national defense."⁶ One of the most prolific sources of labor disputes has always been those arising out of the organizational efforts of employees. As noted, many strikes have occurred because of employers' denial to workers of their right to self-organization and collective bargaining.⁷ Accordingly the National Labor Relations Act⁸ was passed by Congress in order to eliminate the causes of collective bargaining strikes.

An obvious clash of jurisdiction might have resulted if the N.D.M.B. had entertained jurisdiction of labor disputes which were also within the normal scope of the National Labor Relations Board. For example, an employer, engaged in the production of materials essential to national defense, might have discharged a worker for union activities. Ordinarily a dispute engendered by such an unfair labor practice would properly be subject to the jurisdiction of the National Labor Relations Board. Nevertheless the N.D.M.B. would have appeared to have had concurrent jurisdiction of such a case because the dispute could have resulted in the obstruction of production essential to the national defense. Apparently the Order creating the N.D.M.B. did anticipate somewhat the possible clash of authority between the two Boards. In this connection the Order empowered the N.D.M.B. "to request the N.L.R.B., in any controversy or dispute relating to the appropriate unit or appropriate representatives to be designated for purposes of collective bargaining, to expedite as much as possible the determination of the appropriate unit or appropriate representatives of the workers."⁹ By directing the N.D.M.B. to request such expedition of representation disputes, the authority of the N.L.R.B. over the N.D.M.B. in this type of case appeared to be established. Actually the N.D.M.B. did refer cases involving representation issues to the N.L.R.B. On this score, it is reported that whenever a representation issue had to be decided, "the [N.D.M.B.] referred this issue — whether it was incidental or principal — to the N.L.R.B. This reference was made some-

⁵ Executive Order 9017, dated January 12, 1942. Any unsettled cases certified to the National Defense Mediation Board were turned over to the National War Labor Board as were its personnel, equipment, supplies, etc. See chap. 7 for an analysis of the work of the National War Labor Board.

⁶ Executive Order 8716, par. 2. ⁷ See p. 10.

⁸ 49 Stat. 449; see chap. 1, for a discussion of the operation of the Wagner Act.

⁹ Executive Order 8716, par. 2(e).

times by informal suggestions even before a hearing, sometimes by request to the N.L.R.B. to expedite a pending proceeding, sometimes by formal recommendations to the parties."¹⁰

Nothing, however, evidently limited the N.D.M.B. with respect to its authority in unfair labor practice cases. Nonetheless the N.D.M.B. voluntarily restricted its jurisdiction in these cases, and, thereby, again established N.L.R.B. supremacy. In a case involving a union's charge against an employer alleging refusal to bargain, the N.D.M.B. stated that the issues in the dispute "are matters which properly come within the jurisdiction of the N.L.R.B. and recommend that the controversy be disposed of by the [union] filing with the N.L.R.B. appropriate complaints in order that the issues may be heard and properly determined."¹¹ Perhaps the National Defense Mediation Board's decision was prompted by the provision in the Wagner Act which affords exclusive power to the N.L.R.B. over unfair labor practice cases.¹² Whatever the controlling consideration might have been, the N.D.M.B. rule in this respect precluded a potential source of conflict between the two agencies. A contrary policy probably would have caused a high degree of confusion and industrial unrest. Labor organizations would have been uncertain as to the Board with which they should file their unfair labor practice cases. As a result, unions in all probability would have "shopped around" to determine which agency to utilize. Other undesirable consequences which might have arisen from a contrary rule would have included a duplication of effort between the two Boards, waste of time and money, and useless recriminations. Fortunately, however, all of these effects were avoided, and the "relation between the two Boards was altogether harmonious."¹³

Unfair Labor Practice Cases

Despite the National Defense Mediation Board's policy of voluntary limitation with respect to unfair labor practice cases, this Board, in one instance, failed to give credit to an N.L.R.B. ruling in such a matter. In an early case, an employer was previously ordered by the N.L.R.B. not to bargain with a particular employees' union. Notwithstanding the N.L.R.B. order, the N.D.M.B. subsequently recommended that the employer negotiate with the labor organization.¹⁴ But with the exception of this isolated decision, rendered, perhaps, before the N.D.M.B. had an

¹⁰ United States Labor Statistics Bureau, *op. cit.*, p. 34.

¹¹ National Defense Mediation Board, Case No. 52, *In the matter of Federal Mogul Corporation*, certified to the N.D.M.B. on July 2, 1941.

¹² National Labor Relations Act, Sec. 10 afforded exclusive power to the N.L.R.B. with respect to unfair labor practice cases. "This power [over unfair labor practice cases] shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

¹³ United States Labor Statistics Bureau, *op. cit.*, p. 35.

¹⁴ National Defense Mediation Board, Case No. 3, *In the matter of Cornell-Dubilier Electric Corporation*, certified to the N.D.M.B. on March 27, 1941.

opportunity to become fully oriented to its duties, the Board uniformly referred parties to unfair labor practice cases to the N.L.R.B. In general the N.D.M.B. recognized its lack of jurisdiction over such matters, referred the disputants to the N.L.R.B., and requested the latter agency to expedite the cases.¹⁵ A typical case involved a threatened strike over an alleged unfair labor practice. Charges were previously filed by a labor organization with the N.L.R.B., but the union had become impatient while awaiting the Board's disposition of the case. When the matter was referred to the N.D.M.B., this agency persuaded the union not to strike and urged it to wait for the N.L.R.B. decision in the matter. In addition, the N.D.M.B. requested the N.L.R.B. to expedite the case¹⁶

It is noteworthy that the N.D.M.B. requested the N.L.R.B. to expedite action in unfair labor practice cases. As already pointed out, the Order creating the National Defense Mediation Board granted it authority to request expedition only in representation cases. Nevertheless the N.L.R.B. was willing and anxious to cooperate with the N.D.M.B. in the rapid disposition of unfair labor practice cases which threatened to hamper defense production. Accordingly the N.L.R.B. directed its regional offices to give priority to cases involving the national defense program. Not only did the National Labor Relations Board cooperate with the N.D.M.B., but the N.L.R.B. also accorded precedence to cases which the War and Navy Departments certified as threatening to disrupt defense production. On this point the N.L.R.B. declared that "constant cooperation exists between these agencies and Board representatives both in Washington and in the Field."¹⁷ Though recognizing the urgency of such cases, the N.L.R.B. refused, however, to compromise the principles of the Wagner Act. On this score, the Board stated that "in wartime as in peace, it is the duty of the Board to prevent unfair labor practices."¹⁸ Relaxation of the principles of the National Labor Relations Board probably would have encouraged employees to utilize the organizational strike to effect settlement of unfair labor practice disputes. These collective bargaining strikes, of course, would have seriously retarded the defense production program.

Beyond urging the N.L.R.B. to expedite unfair labor practice cases which threatened to obstruct the national defense program, the N.D.M.B. also at times urged parties to such disputes to accept the decisions of N.L.R.B. trial examiners. In one case the N.D.M.B. successfully received a pledge from representatives of both labor and management to accept

¹⁵ National Defense Mediation Board, Case No. 22, *In the matter of Minneapolis-Honeywell Regulator Company*, certified to the N.D.M.B. on April 28, 1941.

¹⁶ National Defense Mediation Board, Case No. 107, *In the matter of Burgess Battery Company*, certified to the N.D.M.B. on November 24, 1941.

¹⁷ National Labor Relations Board, *Sixth Annual Report* (1941), p. 3.

¹⁸ National Labor Relations Board, *Seventh Annual Report* (1942), p. 6.

without further proceedings the findings of the N.L.R.B. trial examiner.¹⁹ Normally either party to an unfair labor practice case can ignore the recommendations of the trial examiner, and request the N.L.R.B. to render a formal decision in the matter. This, of course, entails further time consuming proceedings before the Board. Even after the N.L.R.B. renders a decision, the employer has the right to appeal to the federal courts if he is aggrieved by the Board's final order.²⁰ Such exhaustion of the full procedure provided for in the Wagner Act of necessity delays the ultimate compliance with the law. Labor organizations, at times impatient with this protracted procedure, have struck to force a speedier settlement.²¹ Consequently, the N.D.M.B., by effecting compliance with trial examiners' "Intermediate Reports," short-circuited the full procedure provided for in the Wagner Act. Under this arrangement the union involved in the dispute had little, if any, justification to strike.

Fully respecting the orders of the N.L.R.B. with regard to unfair labor practice cases, the N.D.M.B. in appropriate cases accommodated its own rulings to those of the National Labor Relations Board. One case involved an N.L.R.B. award of back pay. Before the N.L.R.B. rendered a decision the N.D.M.B. urged that a back pay controversy between management and labor be disposed of through arbitration. But after the N.L.R.B. issued a ruling directing the employer to award back pay because of a violation of the Wagner Act, the N.D.M.B. forthwith recommended the removal of the back pay issue from any arbitration proceedings.²² Not only did the N.D.M.B. expect employers to comply with National Labor Relations Board rulings, but also on occasion admonished unions which violated the spirit of the Wagner Act. A typical instance involved an unfair labor practice case in which the N.L.R.B. sought to obtain a contempt decree in a federal court against an employer who ignored a Board decision. Impatient with these judicial proceedings, the union struck and blacked-out Kansas City. Upon urging the union to return its members to their jobs, the N.D.M.B. declared that "in this emergency the universal and ungrudging acceptance of the letter and spirit of the National Labor Relations Act by employers is a compelling obligation. It is an equally compelling obligation on the part of labor to seek and follow its legal remedy in preference to direct actions."²³ It is noteworthy that

¹⁹ National Defense Mediation Board, Case No. 69, *In the matter of Pullman Standard Car Manufacturing Company*, certified to the N.D.M.B. in August, 1941.

²⁰ National Labor Relations Act, Sec. 10(f).

²¹ Such union conduct, wholly inconsistent with the philosophy and the principles of the Wagner Act, has unfortunately occurred. In such cases, however, the Board will not ordinarily award the strikers back pay. See *In the matter of American Manufacturing Company*, 5 N.L.R.B. 443 (1938), affirmed in 309 U.S. 629 (1940).

²² National Defense Mediation Board, Case No. 51, *In the matter of Air Associates, Inc.*, certified to the N.D.M.B. on July 17, 1941.

²³ National Defense Mediation Board, Case No. 73, *In the matter of Kansas City Power and Light Company*, certified to the N.D.M.B. in August, 1941.

the N.D.M.B. exerted a power over the union which the N.L.R.B. lacked. The National Defense Mediation Board urged a truce in the threatened strike until a court reviewed an N.L.R.B. ruling; the moral suasion of the N.D.M.B. in effect thus rendered the provisions of the Wagner Act more meaningful.²⁴

In other instances the National Defense Mediation Board refused to issue rulings until the N.L.R.B. rendered an interpretation of the Wagner Act. As could be expected the N.D.M.B. did not desire to issue a recommendation which would result in a violation of the National Labor Relations Act. One interpretation involved the question of whether an employer may bargain with unions representing only their members pending an N.L.R.B. certification without violating the Wagner Act. Of course, an employer must recognize and bargain only with an N.L.R.B. certified union, and may not lawfully give recognition to any minority union which may exist in the bargaining unit.²⁵ But even in the absence of an N.L.R.B. certified union, an employer maintained that he would violate the Wagner Act if he granted recognition to unions which only represented their members.²⁶ Upon the request of the N.D.M.B., the N.L.R.B. rendered an interpretation of the matter and ruled that the employer would not engage in an unfair labor practice if he recognized unions for their members only until the N.L.R.B. certified an exclusive bargaining agent. On this point the General Counsel of the Board declared "that bargaining with the various unions for members only would not constitute violation of the National Labor Relations Act"; however, he stated further that "the employer may not discriminate as among minority labor organizations but must treat all such claimants on parity, since recognition of any to the exclusion of some would obviously constitute material support to the favorite organization. Such contrasting treatment might well involve interference, restraint, and coercion flowing from such support."²⁷ On the basis of the N.L.R.B. interpretation, the N.D.M.B. subsequently recommended that the employer negotiate contracts with the various unions covering only their members.

²⁴ See also National Defense Mediation Board, Case No. 48, *In the matter of Scullin Steel Company*, certified to the N.D.M.B. on July 7, 1941. In this matter, the N.D.M.B. effectively persuaded the union not to strike while awaiting an N.L.R.B. ruling.

²⁵ An employer violated the Wagner Act if he regarded a certified union as the representative of its members only, refused to recognize such union as the exclusive bargaining agent for all the employees within the unit, and negotiated in any manner with a minority union within the bargaining unit represented by the N.L.R.B. certified union. See *Louisville Refining Company v. N.L.R.B.*, 308 U.S. 568 (1939); *N.L.R.B. v. Sands Manufacturing Company*, 306 U.S. 332 (1939).

²⁶ National Defense Mediation Board, Case No. 108, *In the matter of Nevada Consolidated Copper Corporation*, certified to the N.D.M.B. on November 29, 1941.

²⁷ United States Labor Statistics Bureau, *op. cit.*, p. 260. See also *Consolidated Edison Company v. N.L.R.B.*, 305 U.S. (1938), 197, 237. The Supreme Court apparently would support the N.L.R.B. contention. In the *Edison* case, the Court declared "nor did the contracts make the Brotherhood and its locals exclusive representatives for collective bargaining. On this point the contracts speak for themselves. They simply constitute the Brotherhood the collective bargaining agency for those employees who are its members."

Another important interpretation requested by the N.D.M.B. concerned the award of maintenance of membership.²⁸ The controversy arose after the United States Navy seized the properties of an employer²⁹ who refused to comply with a National Defense Mediation Board recommendation of maintenance of membership for the union involved. As a defense for his action the employer involved in the dispute claimed that he would violate the Wagner Act if he were to comply with the N.D.M.B. ruling. The employer believed that the only type of union security measure permissible under the Wagner Act was the closed shop.³⁰ He contended that although the closed shop is rendered permissible under the law, the maintenance of membership device, falling short of the union security provided by the closed shop, violated the Wagner Act. To reconcile this problem the President of the United States requested the National Defense Mediation Board to inquire of the National Labor Relations Board whether the maintenance of membership measure was inconsistent with the National Labor Relations Act.³¹

Complying with the request for interpretation, the General Counsel of the N.L.R.B. rejected the employer's contention and ruled that an employer does not violate the National Labor Relations Act by executing a contract containing a maintenance of membership clause.³² He declared that a maintenance of membership clause and a closed shop provision are of a similar species inasmuch as both require "as a condition of employment membership in a contracting labor organization."³³ According to the General Counsel, no valid basis existed for ruling that one of the species was lawful under the Wagner Act and the other was not. He rejected the view that such a basis rested upon the comparative inclusiveness of the two provisions. Both were lawful under the terms of the Wagner Act, even though one of the species requires membership in a union of all employees within a plant or bargaining unit, while the other merely demands

²⁸ A device utilized by the National Defense Mediation Board and later by the National War Labor Board to grant unions a measure of security short of the closed shop. Usually a maintenance of membership clause requires employees, members of unions, to retain their membership, as a condition of employment, until the expiration of the contract. It is important to note that the maintenance of membership clause does not compel a worker to join a union. It only provides that once he does join a labor organization, the worker must retain his membership for the duration of the contract. Later refinements of the device even allow an "escape period" in which members may resign from a union possessing the clause without losing their jobs. See McNatt, "The Union Security Issue," *Journal of Business of the University of Chicago*, vol 16, January, 1943. The article expounds the theory of the maintenance of membership clause and presents a thorough analysis of the provision.

²⁹ Executive Order 8868, dated August 23, 1941, which authorized the Navy to seize and operate the properties of the Federal Shipbuilding and Dry Dock Company.

³⁰ *National Labor Relations Act*, Sec. 8(3) provided that an employer engages in an unfair labor practice if he discriminates against an employee by encouraging or discouraging membership in any labor organization. However, the section further provided that an employer does not engage in an unfair labor practice if he discharges an employee pursuant to a closed shop contract executed with a legitimate labor organization which represents a majority of the workers in the bargaining unit.

³¹ United States Labor Statistics Bureau, *op cit.*, p 191. ³² *Ibid.*, p. 35.
³³ National Defense Mediation Board, Case No. 46, *In the matter of the Federal Shipbuilding and Dry Dock Company*, certified to the N.D.M.B. on June 30, 1941.

that employees who have already joined a labor organization remain members for the duration of a collective bargaining contract.

Of course it would be necessary that a union possessing a maintenance of membership clause be an organization free from company domination or assistance, and, in addition, be a majority designated union. With these two conditions satisfied, a maintenance of membership clause, similar to a closed shop provision, is legal under the Wagner Act because the General Counsel of the N.L.R.B. did not believe "Congress intended the [Wagner Act] to protect only one species of agreement requiring as a condition of employment membership in a contracting labor organization."³⁴ A contrary ruling by the N.L.R.B. would have largely nullified the maintenance of membership type of union security. However, in view of the widespread use made of this device by the National Defense Mediation Board and later by the National War Labor Board, it is extremely doubtful that an adverse N.L.R.B. ruling would have withstood possible Congressional action.

In one other important instance the N.L.R.B. rendered an interpretation of significance at the request of the N.D.M.B. This case involved the extension of an appropriate bargaining unit.³⁵ Previously the N.L.R.B. certified affiliates of a parent union in fifteen plants of the same company, and all fifteen affiliates executed separate contracts. Later the parent organization desired to execute a master agreement covering all fifteen plants. Claiming, in part, that such a contract would violate the Wagner Act by disturbing bargaining units previously established by the N.L.R.B., the company refused to agree to the union's request. When the question was presented to the N.L.R.B. for interpretation, the Board ruled that the employer would not engage in an unfair labor practice by executing such a master contract. Acting on the basis of the N.L.R.B. ruling, the N.D.M.B. recommended the execution of the master agreement, which was forthwith done by the company and the union.³⁶

Representation Cases

With respect to representation issues, the N.D.M.B. consistently refused to interfere with the selection of bargaining units or certification of bargaining representatives.³⁷ Utilizing, however, the authority derived from its establishment Order, the N.D.M.B. on many occasions urged

³⁴ United States Labor Statistics Bureau, *op. cit.*, p. 192. Other forms of union security deemed lawful under the Wagner Act included union shop, preferential hiring, preference in layoffs, and under certain conditions, the so-called "harmony clauses." See "'Harmony Clauses' and the Wagner Act," *Labor Relations Reporter*, October 28, 1946, vol. 18, p. 429.

³⁵ National Defense Mediation Board, Case No. 54, *In the matter of Armour and Company*, certified to the N.D.M.B. on July 26, 1941.

³⁶ United States Labor Statistics Bureau, *op. cit.*, p. 203.

³⁷ One exception to this rule was noted in N.D.M.B., Case No. 3. *Supra*, p. 106. The case was certified to the N.D.M.B. only 8 days after its creation.

the N.L.R.B. to expedite the certification of labor organizations involved in representation disputes which threatened to obstruct the national defense effort.³⁸ One typical case involved a jurisdictional strike between C.I.O. and A.F.L. affiliated unions.³⁹ Recognizing its limitation of authority in the matter, the N.D.M.B. refrained from deciding which of the two unions constituted the bargaining agent of the plant's employees. Instead the N.D.M.B. was successful in persuading the parties to the strike to return to work and to submit the dispute to the National Labor Relations Board. At the same time the N.D.M.B. urged the N.L.R.B. to expedite the matter.⁴⁰ Similar to its policy in unfair labor practice cases, the N.L.R.B. was eager to give priority to representation disputes which threatened the national defense program. The N.L.R.B. pointed out that, to avert stoppages in defense industries, it had adopted a system of priorities under which representation cases involving defense industries were given top precedence over non-defense cases. On this score, Millis, Chairman of the N.L.R.B., declared that "the Labor Board has undertaken to forward national defense by giving priority of handling to representation cases involving defense industries."⁴¹

A representation dispute involving a union jurisdictional conflict between two organizations affiliated with the same parent union was similarly deemed by the N.D.M.B. as not falling within its sphere of authority.⁴² It declined to reconcile the controversy on the grounds that the N.L.R.B. refused to interfere with the internal affairs of labor organizations.⁴³ Sometimes, however, the N.D.M.B. requested the N.L.R.B. to certify a bargaining agent in order to facilitate further proceedings under the National Defense Mediation Board. Such a situation was presented in cases where it was necessary that the majority union be determined in order that an employer might execute a contract with a proper bargaining agent. Clearly the N.D.M.B. could not recommend that an employer execute an agreement when a dispute existed over the matter of bargaining representatives. In one case the N.D.M.B. directed the unions involved in

³⁸ See *supra*, p. 105, n. 9.

³⁹ National Defense Mediation Board, Case No. 17, *In the matter of American Car and Foundry Company*, certified to the N.D.M.B. on April 22, 1941.

⁴⁰ In referring representation cases to the N.L.R.B., the N.D.M.B. on occasion also undertook to persuade the parties to shorten the certification procedure of the N.L.R.B. In one such instance, parties were successfully urged to accept a very short notice of hearings, and the employer agreed to furnish forthwith the payrolls of the company to the agent of the N.L.R.B. to facilitate a representation election. See National Defense Mediation Board, Case No. 22, *In the matter of the Minneapolis-Honeywell Regulator Company*, certified to the N.D.M.B. on April 28, 1941.

⁴¹ "Speeding Elections in Defense Disputes," *Labor Relations Reporter*, March 17, 1941, vol. 8, p. 58.

⁴² *Labor Relations Reporter*, May 12, 1941, vol. 8, p. 361.

⁴³ Although the N.D.M.B. interpretation of N.L.R.B. policy in this connection was correct at this time, the N.L.R.B. later reversed a six-year precedent and permitted employers to petition for a representation election when confronted with a jurisdictional dispute between two unions affiliated with the same parent organization. See *In the matter of Harbison-Walker Refractories Company*, 43 N.L.R.B. 161 (1942). See also pp. 240-241, for further discussion of the problem.

a representation dispute to petition the N.L.R.B. for a determination of the exclusive bargaining agent. After that had been accomplished, the N.D.M.B. invited the victorious union to resubmit the controversy involving wages, hours, and other conditions of employment for decision.⁴⁴

On several occasions the N.D.M.B. recommended that employers bargain with N.L.R.B. certified unions. Though the N.D.M.B. refrained from designating appropriate bargaining units, from directing representation elections, and from certifying exclusive bargaining agents, the Mediation Board did not hesitate to advise employers to recognize and to bargain with N.L.R.B. certified labor organizations. In the interest of industrial peace the N.D.M.B. recommended in one case, for example, that an employer "should bargain in good faith with the [union] as the exclusive representative of the employees in the unit certified by the N.L.R.B. as appropriate."⁴⁵ Of course the union involved could have filed a charge with the N.L.R.B. against the employer alleging failure to bargain with a duly certified majority union. If the facts substantiated the charge, the N.L.R.B. eventually would direct the employer to bargain with the union. But this procedure is time consuming, and labor organizations, confronted with such a hostile attitude, at times, are prone to resort to the strike to effect recognition and collective bargaining. By recommending that the employer bargain with the certified labor organization, the N.D.M.B. attempted to eliminate such possible interruptions of defense production. The N.D.M.B. did not believe that it exceeded its authority by issuing such a recommendation. In one sense this position appears valid because no union is required under the terms of the National Labor Relations Act to file an unfair labor practice charge with the Board, nor is the N.L.R.B. empowered to issue a complaint on its own initiative.⁴⁶

In another case a company refused to bargain with an N.L.R.B. certified union because of dissatisfaction with the selection of the bargaining agent. Even though only about three months had elapsed since the N.L.R.B. certification, the employer requested the N.D.M.B. to redetermine the bargaining representative. Holding the employer's position as wholly untenable, the N.D.M.B. recommended that the company bargain with the N.L.R.B. certified union. In this connection the N.D.M.B. pointed out that it must and will "honor the certification of the N.L.R.B.," and that "the N.L.R.B. is a coordinate agency of the Federal Government, established to determine questions of representation, and the rulings of

⁴⁴ National Defense Mediation Board, Case No. 58, *In the matter of Ohio Brass Company*, certified to the N.D.M.B. on August 1, 1941.

⁴⁵ National Defense Mediation Board, Case No. 44, *In the matter of Western Cartridge Company*, certified to the N.D.M.B. on June 28, 1941.

⁴⁶ See National Labor Relations Act, Sec. 10(b), which provided that the N.L.R.B. shall have power to issue a complaint against a violator of the Act only "whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice."

the N.L.R.B. on such questions are not subject to review before this Board."⁴⁷

As a wartime expedient, it appears that one can approve the efforts which the N.D.M.B. made to effect compliance with the Wagner Act. By recommending that employers bargain with certified unions, the N.D.M.B. may have skirted the edge of the N.L.R.B. area of jurisdiction. However it is extremely doubtful that such activities impaired the operations of the N.L.R.B. In the light of the increased volume of work thrust upon the N.L.R.B. as a result of the defense production program,⁴⁸ the N.L.R.B. probably welcomed these efforts of the National Defense Mediation Board. In addition it may be pointed out that the N.D.M.B. in this respect did not compromise the principles of the Wagner Act.

An analysis of the experiences of the N.L.R.B.-N.D.M.B. relationship appears to be of importance in its own right. However the study of these experiences becomes even more significant in that many of the precedents established by the N.D.M.B. with respect to jurisdictional relationships were later adopted by the National War Labor Board. The analysis of the latter Board's activities in connection with the N.L.R.B. reveals that the N.W.L.B. duplicated the N.D.M.B. policies with respect to the maintenance of membership device, contracts for union members only, the consolidation of several bargaining units into a single unit, and requiring employers to bargain with N.L.R.B. certified unions. It appears that the work of the N.W.L.B. was facilitated in this respect by the precedents established by the National Defense Mediation Board.

⁴⁷ National Defense Mediation Board, Case No 51, *In the matter of Air Associates, Inc.*, certified to the N.D.M.B. on October 9, 1941.

⁴⁸ In the fiscal year 1941, the Board considered a total of 9151 unfair labor practice and representation disputes as compared with a total amount of 6177 cases in the previous fiscal year. National Labor Relations Board, *Tenth Annual Report* (1945), p. 6.

Chapter 7

RELATIONSHIP TO THE NATIONAL WAR LABOR BOARD

The World War I National War Labor Board

Strikes in peacetime are detrimental to the parties immediately involved in the dispute as well as to the general public. Workers lose wages, employers' sales are curtailed, and the general public suffers because of diminution of production and services. Some strikes lead to actual violence with ensuing loss of life, personal injuries, and destruction of property. Though serious enough in times of peace, strikes occurring in wartime endanger the security of the nation. The sovereignty of the nation is threatened to the extent that strikes interfere with the production of the tools of war.

Totalitarian states have an effective remedy for the solution of strikes — they are simply outlawed and workers who engage in them are ordinarily severely disciplined. Perhaps such a solution would be tolerable in societies in which no private property exists inasmuch as the only employer-employee relationship involves the worker and the state. In a democratic society, however, in which practically all the means of production are operated for private profit, ruthless treatment of striking employees would place the government in the position of unfairly favoring management. Under such circumstances, employers would have a free hand in their relationship with workers. No matter how onerous an employer's labor policy may be, his employees could strike only on the pain of governmental inflicted punishment. This solution of the wartime or peacetime strike problem is accordingly rejected in our society as incompatible with the fundamental principles of democracy. Instead in World I and World War II, American labor voluntarily renounced its right to strike, and the government established agencies to protect employees during the periods in which they freely abandoned their chief economic weapon.

In a democratic society, labor's relinquishment of the right to strike would probably be of little practical value unless the common government sets up machinery to reconcile grievances of labor. Disputes over wages, hours, union security, and working conditions do not, unfortunately, disappear during war years. In fact, labor controversies in these periods tend to increase because of the mounting tempo of work and because of the lowered morale of workers which, in part, is attributable to wartime restrictions. Unless an impartial agency is created to decide upon the merits of labor disputes, employers could greatly abuse labor's no-strike pledge. Extreme abuse, of course, would no doubt nullify the effectiveness of the pledge. It would appear indispensable, therefore, that

a no-strike pledge be supported by governmental assurance that complaints of workers will be settled fairly and promptly during the time in which they freely relinquish their chief economic method of effecting settlement of disputes. To the degree that a democratic government fails in this respect, labor's no-strike pledge would be rendered meaningless, and labor strife will interfere with the nation's war production program.

In the light of these considerations, the United States government established the first National War Labor Board during World War I for the purpose of settling labor-management disputes. Its functions and powers were set forth in the Executive Order which created the Board.¹ Specifically, the first National War Labor Board was empowered "to settle by mediation and conciliation controversies arising between employers and workers in fields of production necessary for the conduct of the war."² Although the Board had no express authority to enforce its recommendations, the President in practice did compel compliance with the Board's rulings through the exercise of his war powers.³

Before creating the National War Labor Board, President Wilson asked representatives of labor and management to convene in order to establish a method of peaceful labor dispute adjustment which would be acceptable to both groups. As a result of this conference, the World War I National War Labor Board was guided by a set of principles agreed to by the labor and management representatives. Any decision rendered by the first N.W.L.B. was required to conform to the principles established by the conference. One principle removed the closed shop controversy from the scope of the first War Labor Board's authority. In effect, the closed shop was frozen during the World War I. In plants in which unions possessed the closed shop agreement, the same was to continue for the duration of the war. On the other hand, the first N.W.L.B. could not order the abandonment of the open shop in an open shop-closed shop dispute.⁴

A second set of principles attempted to protect employees in their right to self-organization and collective bargaining. In fact, the specific provisions in this respect were similar to the language embodied in the National Labor Relations Act.⁵ As no agency similar to the National

¹ President Wilson issued the order establishing the World War I National War Labor Board on April 8, 1918.

² National War Labor Board, *Report April, 1918 to May, 1919*, p. 2.

³ *War Labor Reports*, vol. 1, p. xi. On one occasion, the President seized the properties of the Western Union Telegraph Company because the carrier would not cease discharging employees who joined unions. Similarly, the Smith and Wesson Arms Company was seized when the corporation refused to bargain collectively.

⁴ *Ibid.*, p. x

⁵ National War Labor Board, *op cit.*, pp. 121-22. Thus, one principle established by the labor-management conference provided: "The right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever. . . . Employers should not discharge workers for membership in trade unions, nor for legitimate trade union activities." As such, the provisions are strikingly similar to the language of the National Labor Relations Act.

Labor Relations Board existed during the first World War, the first National War Labor Board was to protect the organizational activities of workers. In this way it was hoped that strikes caused by employers' denial of the right of employees to self-organization and collective bargaining would be materially reduced. As will be indicated later, no similar mandate was given to the World War II National War Labor Board.⁶ In contrast, the latter Board was expressly forbidden to render decisions not in conformity with the policies of the National Labor Relations Act and was admonished not to invade the jurisdictional area of the National Labor Relations Board.⁷ Finally, other principles guided the first N.W.L.B. in controversies involving wages, hours, women workers, health and safety standards, and other conditions of work.⁸

During its period of operation, April 30, 1918-May 31, 1919, the first N.W.L.B. handled 1245 disputes.⁹ Of these, the Board made awards or findings in 462 of the cases. The remaining matters were referred to other agencies having original jurisdiction, or were dismissed because of voluntary settlement, lack of jurisdiction, or for other reasons. In addition to the cases in which original awards were rendered, the Board later made 58 supplementary decisions, making a total of 520 formal awards and findings issued by the first National War Labor Board.¹⁰ No less important than the statistical record of the Board was the substantive content of its decisions. With respect to organizational problems, the Board anticipated later N.L.R.B. rulings when it recommended the reinstatement of workers with back pay who were discharged because of union activities;¹¹ required employers to bargain collectively with representatives of workers' labor organizations;¹² and ordered the polling of workers in secret elections to determine their choices of bargaining agents.¹³ In commenting on the Board's work, the Secretary of the first N.W.L.B. declared that its "record within a period of less than 13 months is one which unquestionably has never been approached by any similar agency in the history of industry."¹⁴

The World War II National War Labor Board

With the outbreak of hostilities on December 7, 1941, the President of the United States was fully aware of the importance of instituting machinery which would provide the basis for the peaceful adjustment of labor disputes. As indicated, the National Defense Mediation Board did not possess the authority to make a final settlement of labor con-

⁶ See *infra*, p. 120.

⁷ See Executive Order 9017, dated January 12, 1942; Executive Order 9250, dated October 3, 1942; and War Labor Disputes Act, 57 Stat. 163, Sec. 7(a)(2). See also, *infra*, p. 120.

⁸ National War Labor Board, *op. cit.*, p. 122.

⁹ *Ibid.*, p. 5.

¹⁰ *Ibid.*, pp. 5-6.

¹¹ *Ibid.*, p. 53.

¹² *Ibid.*, p. 56.

¹³ *Ibid.*, p. 60.

¹⁴ *Ibid.*, p. 5.

troveries.¹⁵ Moreover, the prestige of the N.D.M.B. was greatly weakened when the Congress of Industrial Organizations withdrew its members from the Board as a result of the "captive coal mine decision."¹⁶ Consequently on December 13, 1941, only six days after the attack on Pearl Harbor, President Roosevelt, similar to the action taken by President Wilson,¹⁷ issued a call for a conference of representatives of labor and management. In issuing the proclamation convening the conference, the President declared that he desired speed, a complete agreement that all World War II disputes would be settled peacefully, and that labor would render a no-strike pledge. On this score, he stated, "I know, if I were moderator, I would want results — a complete agreement. I would want something else and as moderator I might help get it. I want speed. Speed now is of the essence, just as much in turning out the things in plants as it is among the fighting forces."¹⁸

Responding to the President's plea for speed, the conference met on December 17, 1941, and shortly thereafter submitted its report to the Chief Executive. As a result of the conference, labor again voluntarily relinquished its right to strike for the duration of the war. It was further recommended to the President that a War Labor Board be established to settle labor disputes. With respect to the jurisdiction of the proposed War Labor Board, there was mutual agreement among labor and management representatives on all issues, except on the one involving the closed shop. Employer representatives contended that a dispute involving the closed shop controversy should not be settled by the National War Labor Board. On this point management declared that it believed "the board should not accept for arbitration or consideration the issue of the closed shop, requiring a person to become or remain a member of a labor organization if he is to get or hold a job."¹⁹ On the other hand labor was just as emphatic in its contention that the Board should settle all disputes including those arising out of the closed shop controversy.²⁰ Union representatives were apparently not convinced that management was only concerned with the philosophical implications of the closed shop. Rather some labor leaders may have believed that some employers might attempt to utilize the war period to weaken the position of organized labor. If management's position with respect to the closed shop issue were accepted, workers, pledged not to strike, could do little to protect their unions from

¹⁵ See p. 104, for a discussion of this issue. ¹⁶ See p. 104, n. 2.

¹⁷ However, President Wilson did not convene the World War I management-labor conference until January, 1918, and the first N.W.L.B. was not created until April 8, 1918, notwithstanding the fact that the United States entered the first World War on April 6, 1917. National War Labor Board, *op. cit.*, p. 119.

¹⁸ "A Pivotal Conference for Labor Relations," *Labor Relations Reporter*, December 22, 1941, vol. 9, p. 425.

¹⁹ *Labor Relations Reporter*, December 29, 1941, vol. 9, p. 462.

²⁰ McNatt, "The Union Security Issue," *Journal of Business of the University of Chicago*, January, 1943, vol. 16, p. 65.

hostile employer conduct. In the light of these considerations, it is understandable why labor "hailed with delight" the President's interpretation of the conference's report as meaning that all disputes including the closed shop controversy were to be within the jurisdiction of the N.W.L.B.²¹

On January 12, 1942, the President issued an order creating the second N.W.L.B.²² The Order provided that the Board was to be composed of twelve members, of which four would represent respectively labor, management, and the public. If a labor dispute threatened to interrupt work contributing to the effective prosecution of the war, the parties, under terms of the Order, were required to attempt settlement of the dispute by direct negotiation. If the controversy was not reconciled by this procedure, the Order further required that the aid of the United States Conciliation Service be sought to adjust the controversy. Only after exhaustion of both of these methods was the N.W.L.B. authorized to assume jurisdiction of a dispute. If the United States Conciliation Service was not successful in effecting a settlement, the Secretary of Labor was required to certify the dispute to the N.W.L.B. Once the N.W.L.B. did assume jurisdiction of a labor controversy, the Board's powers were complete and final. The President ordered the N.W.L.B. "to finally determine the dispute, and for this purpose [to] use mediation, voluntary arbitration, or arbitration."²³ The powers of the second N.W.L.B. were therefore more complete than the authority conferred upon either the National Defense Mediation Board or the first National War Labor Board. To enforce its orders the N.W.L.B. first utilized "public opinion." If this weapon failed the N.W.L.B. referred the dispute to the President for his consideration which frequently resulted in the government's seizure of the plant involved in the controversy. In practice the President did not hesitate to take this "drastic action" when necessary.²⁴ In the war period the President actually seized plants on forty different occasions.²⁵

During the course of its operations the N.W.L.B. established a notable record. Prior to August 14, 1945, V-J Day, the N.W.L.B. disposed of 17,807 disputes involving approximately 12,300,000 workers. With respect to the wage stabilization program,²⁶ the agency denied voluntary wage increases in 58,794 instances which involved 2,866,000 employees. For the first time in the history of the United States nearly three million employees could not obtain wage increases even though the raises were

²¹ *Labor Relations Reference Manual*, vol. 9, p. 947.

²² Executive Order 9017.

²³ *War Labor Reports*, vol. 1, p. xviii.

²⁴ W. L. Morse (Public Member of the National War Labor Board), "Basic Doctrines of W.L.B. Decisions," *Labor Relations Reporter*, September 28, 1942, vol. 11, p. 89.

²⁵ *Labor Relations Reporter*, January 7, 1946, vol. 17, p. 605.

²⁶ Unlike the World War I National War Labor Board and the National Defense Mediation Board, the second National War Labor Board subsequently received the additional task of wage stabilization. See Executive Order 9250, dated October 3, 1942. See also chap. 4.

agreed to by their employers. As for the N.W.L.B. success in reducing strikes,²⁷ the record indicates that the annual average man-days lost to industry because of work stoppages during the war period, in relation to the number of man-days worked, was 11/100 of 1 per cent. In comparison, an average of 27/100 of 1 per cent was lost from total working time because of work stoppages in the years 1935-1939. Whereas the average duration of strikes amounted to 23 days in 1939, 21 days in 1940, and 18 days in 1941, the average duration of strikes was much less during the war years. In 1942, the average length of a strike was 12 days, in 1943 only 5 days, and in 1944, 5½ days.²⁸ It would appear that labor, assured that its grievances would be adjusted fairly by the N.W.L.B., largely maintained its wartime no-strike pledge.

Jurisdictional Relationship

In considering the nature of the first N.W.L.B., it was noted that President Wilson ordered that Board to assume some of the duties now exercised by the National Labor Relations Board.²⁹ No such duty was charged to the second National War Labor Board. This, of course, was not necessary because the National Labor Relations Act, in war as in peace, provided the necessary machinery for the peaceful adjustment of union organizational disputes. In fact, employee members of the President's labor-management conference were deeply disturbed over the possibility that the N.W.L.B. might invade the N.L.R.B. jurisdictional area. Accordingly, representatives of labor, in order to protect the principles of the Wagner Act, submitted to the President as part of the conference's report, the recommendation that "the labor policies as established in the N.L.R.A. shall continue unimpaired."³⁰

Aware of the potential implications of an N.L.R.B.-N.W.L.B. jurisdictional conflict, the President, in establishing the N.W.L.B., prohibited the latter Board from invading the National Labor Relations Board's sphere of authority.³¹ Furthermore the N.W.L.B. was enjoined from rendering any decision inconsistent with the provisions of the National

²⁷ See chap. 14 for further consideration of the wartime organizational strike problem.

²⁸ *Labor Relations Reporter*, January 7, 1946, vol. 17, p. 604. ²⁹ See p. 116.

³⁰ *Labor Relations Reference Manual*, vol. 9, p. 949.

³¹ Executive Order 9017, dated January 12, 1942, which created the National War Labor Board, stated in par. 7 that "nothing herein shall be construed as superseding or in conflict with the provisions of the National Labor Relations Act;" par. 2 of Executive Order 9017 further provided that the Order did not "apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until those procedures have been exhausted." In Sec. 4 of the Wage Stabilization Act of October 2, 1942 (56 Stat. 765), Congress provided that no action was to be taken under the authority of the law "with respect to wages or salaries . . . which is inconsistent with the provisions of the National Labor Relations Act." Executive Order 9250, dated October 3, 1942, which placed the responsibility of the administration of the wage control law with the N.W.L.B. provided under Title IV that nothing in the Order was to be construed "as superseding or in conflict with the provisions of the . . . National Labor Relations Act." The War Labor Disputes Act, enacted on June 25, 1943, provided a statutory basis for the operation of the National War Labor Board, and prohibited the N.W.L.B. from issuing orders inconsistent with the National Labor Relations Act. See Sec. 7(a)(2).

Labor Relations Act as administered by the N.L.R.B. Subsequent executive orders and legislation defining the scope of the National War Labor Board's jurisdictional area also contained these limitations. These restrictions were apparently adopted to insure that labor's Wagner Act rights and privileges would not be weakened under the pretext of war necessity. Congress and the President believed the limitations necessary even though the Wagner Act makes the power of the N.L.R.B. exclusive over disputes resulting from the denial by employers of labor's right to self-organization and collective bargaining.³²

In the light of these facts, it would appear that the N.W.L.B., while exercising its authority to settle finally a labor dispute "which might interrupt work which [contributed] to the effective prosecution of the war," would refrain from giving consideration to any controversy normally falling within the jurisdictional area of the N.L.R.B. Even though a union organizational dispute might have threatened war production, it would be expected that the N.W.L.B. would refer the parties involved in the controversy to the National Labor Relations Board. But prompted no doubt by its zeal to eliminate all strikes which might have diminished war production, the N.W.L.B. frequently entertained disputes which normally would have been subject to N.L.R.B. authority. On this score the N.W.L.B. declared that upon occasion it "had to decide disputes [normally within N.L.R.B. jurisdiction] involving such issues because of their effect on war production."³³

The N.W.L.B. did not decline jurisdiction over a dispute merely because its issues related to the field of activity covered by the National Labor Relations Act. Instead the War Labor Board exercised its authority over many disputes which the N.L.R.B. ordinarily would have resolved. In determining the propriety of assuming jurisdiction over an organizational controversy, the N.W.L.B. regarded as controlling the consideration of whether or not the dispute threatened to interfere with war production. With respect to the limitations placed on it, the N.W.L.B. stated that the restrictions did not "place a limitation on the Board's power to determine on their merits whatever issues may arise in a dispute, but rather places procedural limitations on the Board requiring that procedures of other existing agencies for settlement of labor disputes shall be exhausted before the Board takes jurisdiction."³⁴

According to the N.W.L.B., the fact that a dispute was one normally subject to N.L.R.B. authority did not necessarily preclude War Labor

³² National Labor Relations Act, 49 Stat. 449, Sec. 10(a) provided that the powers of the N.L.R.B. to prevent unfair labor practices, as defined in the Wagner Act, "shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

³³ National War Labor Board, *Summary of Decisions of the National War Labor Board*, January 12 to February 14, 1943, vol. 1, p. 47. ³⁴ *War Labor Reports*, vol. 1, p. 326.

Board action. Only when the Wagner Act procedures had been exhausted was the N.W.L.B. prepared to assume jurisdiction over a union organizational controversy. Strict adherence to this policy by the N.W.L.B. would apparently have precluded a serious N.L.R.B. - N.W.L.B. jurisdictional problem. However, in practice this restriction of the N.W.L.B. jurisdiction did not prove to be a rigid limitation to N.W.L.B. action in organizational controversies. Nothing in the Wagner Act compels an employee or a labor organization to file an unfair labor practice charge with the National Labor Relations Board.³⁵ Only when a charge is filed does the Wagner Act become operative. Accordingly the N.W.L.B. concluded that the procedures of the National Labor Relations Act had been "exhausted" when a labor organization or an employee refused to file a charge with the National Labor Relations Board. Under these circumstances N.W.L.B. believed it could properly settle a dispute involving organizational elements. As will be indicated this willingness of the N.W.L.B. to entertain disputes involving organizational issues complicated the relationship between that agency and the National Labor Relations Board. In certain instances the two agencies' policies conflicted and adjustment of the divergent positions became necessary. Actually, however, the jurisdictional problems were largely resolved amicably by virtue of joint conferences attended by high ranking members of the two Boards.³⁶

With respect to the jurisdictional problem, the N.L.R.B. refused to consider a ruling of the N.W.L.B. as controlling over matters involving the National Labor Relations Act. One instance involved alleged discriminatory discharges of employees. An employer urged that the N.L.R.B. should not assume jurisdiction over the case because he believed the union had not exhausted the procedure outlined in the collective bargaining contract relating to the adjustment of disputes. He further supported his contention by alleging that the N.W.L.B. refused to reinstate another group of workers after discharge because the union had not exhausted the procedure in their contract for reinstatement after discharge.³⁷ However, the N.L.R.B. rejected this argument and assumed jurisdiction over the case.³⁸

Neither did the N.L.R.B. permit the compromise of the provisions of

³⁵ National Labor Relations Act, Sec. 10(b). See also *supra*, p. 113, n. 46.

³⁶ See *Sixth Regional War Labor Board Manual*, "Report to the N.W.L.B. on Conferences with Messrs. Millis, Reilly, Houston of the N.L.R.B.," May 27, 1943. The use of the *Manual* was made possible through the efforts of E. B. McNatt, wartime Director of the Wage Stabilization Division of the Sixth Regional War Labor Board. As the *Manual* contains material not available through the customary sources of information, it was of particular importance in the development of this portion of the study.

³⁷ *In re Briggs Manufacturing Company*, 5 War Labor Reports 340 (1942).

³⁸ *In the matter of S. K. Wellman Company*, 53 N.L.R.B. 214 (1943).

the Wagner Act in cases which involved the National War Labor Board.³⁹ In a matter involving this issue, a union filed a charge with the N.L.R.B. alleging that an employer discharged thirty-one employees discriminatorily and was giving unlawful support to a labor union. At the same time, the N.W.L.B. took jurisdiction of the dispute on the ground that the controversy threatened to interrupt war production. Through the mediatory efforts of the N.W.L.B., the employer was willing to reinstate the thirty-one employees and award them back pay. In consideration of this action, the union agreed to withdraw its charges from the N.L.R.B.⁴⁰ Though the N.L.R.B. offered no objections to the reinstatement of the thirty-one workers, the Board vigorously opposed the portion of the agreement which traded off immediate settlement of the discharge issue for the withdrawal of charges alleging employer domination of a trade union.⁴¹ On this point the N.L.R.B. declared that "the agreement did not remedy these two allegations, concerning which a *prima facie* case had been found and incorporated into a complaint and a date set for a hearing, but, in effect, attempted by mutual arrangement to compromise that section of the Act which outlaws company-dominated unions."⁴²

Had the N.L.R.B. permitted parties to a dispute, aided by the mediatory efforts of the N.W.L.B., to bargain away fundamental principles of the Wagner Act, the agencies' jurisdictional problem would have been simplified. Such a position would have afforded the N.W.L.B. with the opportunity of making settlements of unfair labor practice disputes regardless of whether the adjustments violated National Labor Relations Act principles. Again no great jurisdictional problem would have developed had the N.L.R.B. deferred to the rulings of the N.W.L.B. in matters involving the Wagner Act. Instead the N.L.R.B. asserted its independence from the N.W.L.B. on issues concerning the National Labor Relations Act and indicated that there was to be no weakening of the Act's principles.

The Bargaining Unit

As noted in Chapter 1, a major function of the National Labor Relations Board is to certify trade unions for the purposes of collective bar-

³⁹ As noted, the N.L.R.B. is not a mediatory agency. Rather it is a quasi-judicial body charged with the responsibility of enforcing a federal statute. Unlike the National Defense Mediation Board and the National War Labor Board, the N.L.R.B. has no conciliatory or mediatory functions. It is important to record once again that President Roosevelt, when approving the Wagner Act, declared that "compromise, the essence of mediation, has no place in the interpretation of the law." See National Labor Relations Board, *First Annual Report* (1936), p. 9.

⁴⁰ *In re Carter Carburetor Corporation*, 6 War Labor Reports 566 (1943).

⁴¹ In this connection, it is noteworthy that the United States Conciliation Service apparently did not attempt to compromise principles of the Wagner Act. Thus the Conciliation Service declined to "trade-off" unfair labor practice charges for immediate adjustment of disputes over wages, hours, contract interpretation, and other conditions of work. (This information was obtained in a personal interview with C. H. Alsip, Field Supervisor of the Chicago Regional Office of the United States Conciliation Service.)

⁴² *Labor Relations Reporter*, June 22, 1942, vol. 10, p. 536.

gaining. Once certified, the labor organization becomes the exclusive bargaining agent for all the employees within the bargaining unit. Accordingly an employer who refuses to bargain with an N.L.R.B. certified labor union engages in an unfair labor practice.⁴³ Prerequisite to the certification of the bargaining agent is the determination of the group of workers which is to be represented by the labor organization. Consequently the N.L.R.B. is empowered to decide the unit for the purposes of collective bargaining. Once the unit is established, an election may be directed to ascertain which union, if any, has the support of a majority of the employees within the bargaining unit.⁴⁴ By authorizing the N.L.R.B. to determine the scope of the bargaining unit and to certify collective bargaining representatives, Congress attempted to provide the machinery whereby representation disputes might be resolved peacefully. During its prewar operations, the N.L.R.B. had established a vast body of precedent and policy with respect to its certification duties.⁴⁵

Notwithstanding the provisions contained in the Wagner Act, and despite the limitations placed on the jurisdictional scope of the National War Labor Board, the N.W.L.B. did exercise its authority in one instance in such a way as to disturb an N.L.R.B. bargaining unit designation. The N.L.R.B. had certified a union as the bargaining agent for a group of workers employed by a shipbuilding company. In spite of this N.L.R.B. determination of the bargaining unit, the N.W.L.B. ruled, in a proceeding involving the union and the employer, that the labor organization was entitled to represent all future employees engaged by the company to operate all future shipbuilding and ship repair facilities.⁴⁶ Here the N.W.L.B. apparently ignored the attempts of Congress and the President to enjoin the N.W.L.B. from invading the area normally occupied by the National Labor Relations Board. In a conference attended by ranking N.L.R.B. and N.W.L.B. officials, the N.L.R.B. indicated that the N.W.L.B. had exceeded its authority in the *Bethlehem Steel Company* case. As a result of the meeting, the N.W.L.B. recognized the dangers

⁴³ National Labor Relations Act, Sec. 9(a) provided that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all employees in such unit for the purpose of collective bargaining." Sec. 9(c) provided that the Board may investigate any controversy concerning the representation of employees, and shall "certify to the parties, in writing, the name or names of the representatives that have been designated or selected." Sec. 8(5) made it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provision of Section 9(a)."

⁴⁴ *Ibid.*, Sec. 9(b) empowers the Board to "decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and, otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof." Sec. 9(c) further directed the Board to take a secret ballot of employees or to utilize any other suitable method to ascertain the desires of workers with respect to bargaining agents.

⁴⁵ See National Labor Relations Board, *Sixth Annual Report* (1941), pp. 63-79 for a record of the principles established by the Board in representation cases. See also pp. 16-18 for a treatment of this phase of the Board's work.

⁴⁶ *In re Bethlehem Steel Corporation*, 6 War Labor Reports 513 (1943).

implicit in exercising authority over representation cases and accordingly deferred to the N.L.R.B. view. On this point the N.W.L.B. declared "this is our own conclusion, and likewise we recommend that if it is feasible to do so, the *Bethlehem Steel* order should be amended accordingly. In any event, in future cases, we should have nothing to do with the fixing of the bargaining unit or the governing of employees thereunder."⁴⁷

In conformity with the new policy established in the joint conference, the N.W.L.B. subsequently refused to consider labor disputes involving representation issues. One case involved an A.F.L. complaint that the N.L.R.B. discriminated against the craft unit and demonstrated unfair favoritism towards the industrial unit.⁴⁸ In an attempt to upset an N.L.R.B. ruling, an A.F.L. affiliate petitioned the N.W.L.B. to order the N.L.R.B. to revoke a previous decision, make a new determination of the bargaining unit, and hold a new election. As an alternative, the A.F.L. requested the N.W.L.B. to appoint a panel to hear the controversy and to make new recommendations upon the same issues previously determined by the National Labor Relations Board. In short, the A.F.L. union evidently desired the N.W.L.B. to assume the functions of the N.L.R.B. In rejecting the A.F.L. petition, the N.W.L.B. declared that the

War Labor Board must refuse to take jurisdiction and exercise its powers in this case on the issue thus presented; to do so would not be good government, good law, good industrial relations, nor good sense. . . . Utter chaos would result if the N.W.L.B. should ever undertake to set aside, review, or modify the decisions and certifications of the N.L.R.B. Every act of the N.L.R.B. would give rise to a "dispute" to be heard and determined by this Board if the powers of the W.L.B. were improperly invoked in this or any similar case. Confusion and uncertainty would result. Industrial relations of this country would be unsettled constantly, which would inevitably lead to more labor disputes, impaired production, and the tragic loss of essential implements of war.⁴⁹

Further implementation of the N.W.L.B. policy of restraint prompted this agency (1) to refuse to include clerical employees in a production workers' bargaining unit;⁵⁰ (2) to reject a union's request to represent employees previously excluded from the bargaining unit by the N.L.R.B.;⁵¹ and (3) to decline to order the consolidation of six employer groups into one bargaining unit, as requested by a labor organization, on the grounds that the issue involved a matter exclusively within the National Labor Relations Board's jurisdiction.⁵² After the N.L.R.B. ruled that an employer's production and maintenance workers constituted a single bargaining unit, the N.W.L.B., in another case, rejected the contention of the company involved that the N.W.L.B. order separate contracts for the

⁴⁷ *Sixth Regional War Labor Board Manual*, op. cit., p. 4.

⁴⁸ *In re Phelps-Dodge Corporation*, 11 War Labor Reports 71 (1943). See pp. 33-35 for an analysis of the A.F.L. charge. ⁴⁹ *Ibid.*, p. 72.

⁵⁰ *In re Federal Shipbuilding and Dry Dock Company*, 11 War Labor Reports 226 (1943).

⁵¹ *In re Gerber Products Company*, 12 War Labor Reports 74 (1943).

⁵² *In re Midwestern Trucking Operators*, 12 War Labor Reports 199 (1943)

maintenance and production workers.⁵³ In deciding this matter the N.W.L.B. stated that it could not "review" the appropriateness of N.L.R.B. findings. Neither did the N.W.L.B. favorably consider the application of a group of welders who requested that Board to designate them as a separate bargaining unit.⁵⁴ Again the N.W.L.B. declared that such a matter could only be determined by the National Labor Relations Board.

Similar to its predecessor, the National Defense Mediation Board, the National War Labor Board often requested the National Labor Relations Board to expedite representation cases which threatened to disrupt war production. One instance involved the demands of a labor organization to be designated as the sole bargaining agent of a group of streetcar and bus employees. The labor organization requested the N.W.L.B. to issue a certification, but the War Labor Board rejected the request stating again that "the question at issue can be appropriately resolved only by the N.L.R.B."⁵⁵ However, the N.W.L.B., in the interest of war production, exacted a pledge from the parties of the dispute to continue operations until the N.L.R.B. resolved the controversy. In addition the N.W.L.B. urged the N.L.R.B. to expedite the case. As in the prewar defense production period the N.L.R.B. fully cooperated with the N.W.L.B. by giving a high degree of priority to cases involving war industries. In reaffirming this policy the N.L.R.B. declared that machinery had "been established under which constant relationships are maintained with the N.W.L.B. and the Department of Labor, for the purpose of exchanging information and integrating closely efforts for the maintenance of industrial peace. Essentially, the Board's function in relation to war plants in which other agencies are interested is to act with speed, whether the case involved is a question concerning representation or a charge of unfair labor practice. The Board has considered cases involving such plants to be of first importance, and has given them priority."⁵⁶ Moreover, the N.W.L.B. upon many occasions requested the N.L.R.B. to act forthwith on a representation case because certification of a bargaining agent was the prerequisite to the settlement of disputes involving wages and other employment conditions.⁵⁷ Finally, in the interest of speed the N.W.L.B. frequently persuaded the parties to a representation dispute to accept in good faith the outcome of N.L.R.B. proceedings. In this connection the War Labor Board, at times, successfully urged unions and employers involved to refrain from unduly protracting the N.L.R.B. certification procedure and to cooperate fully with the National Labor Relations Board.⁵⁸ Thus, while

⁵³ *In re Wilson-Jones Company*, 3 War Labor Reports 312 (1942).

⁵⁴ *In re Curtiss-Wright Corporation*, 13 War Labor Reports 523 (1944).

⁵⁵ *In re Virginia Electric and Power Company*, 1 War Labor Reports (1942), 74, 76.

⁵⁶ National Labor Relations Board, *Eighth Annual Report* (1943), p. 5.

⁵⁷ National Labor Relations Board, *Seventh Annual Report* (1942), p. 5.

⁵⁸ See *Labor Relations Reporter*, August 3, 1942, vol. 10, p. 750.

referring representation disputes to the N.L.R.B., the N.W.L.B., within the boundaries of its own jurisdictional area, attempted to preserve industrial peace. Such activities of the N.W.L.B. were in the interest of war production, and, moreover, could hardly be regarded an improper encroachment into the territory occupied by the National Labor Relations Board.

Basing its action upon the interpretation rendered by the N.L.R.B. for the benefit of the National Defense Mediation Board in the *Armour and Company* case,⁵⁹ the N.W.L.B. ordered an employer to execute a master contract covering five individual bargaining units.⁶⁰ Previously the N.L.R.B. had certified five union locals in individual plants operated by a single employer. The labor organization subsequently desired a single contract to cover all the five plants. However, the company contended that it could not lawfully comply with the union demands since the N.L.R.B. had already certified the five locals. According to the employer, execution of a master agreement would illegally disturb bargaining units already established by the N.L.R.B. Pointing to the precedent of the *Armour and Company* case, the N.W.L.B., however, directed the company to execute a master contract. Since the N.L.R.B. had already ruled that such a contract did not violate the Wagner Act, the N.W.L.B. believed that it might properly direct the master agreement. Neither did the N.W.L.B. refrain from ordering a contract extending a bargaining unit determined by the N.L.R.B. where the employer involved had previously voluntarily agreed to the new unit. As originally designated by the N.L.R.B., the unit did not include certain employees. Voluntarily agreeing to the union's request, the employer, however, subsequently executed a contract including the formerly excluded workers. But when the contract was up for renewal the company refused to agree to the inclusion of these employees in the unit. Pending any final determination by the N.L.R.B., the N.W.L.B. directed the employer to execute a contract covering the unit as previously agreed to by the company.⁶¹ Finally, the N.W.L.B. did not hesitate to settle disputes involving other conditions of work when the case also included a representation issue. In such a matter, the N.W.L.B. admonished the Sixth Regional War Labor Board for dismissing an entire case when there were other issues under controversy beyond the bargaining agent dispute. The National Board held that it was proper for the War Labor Board to settle the other issues, even though jurisdiction over the representation portion of the case was refused.⁶²

⁵⁹ See *supra*, p. 111.

⁶⁰ *In re Wilson and Company*, 2 War Labor Reports 122 (1942)

⁶¹ *In re Bendix Aviation Corporation*, 17 War Labor Reports 806 (1944) and 20 War Labor Reports 568 (1944).

⁶² *In re Sears Roebuck and Company*, 16 War Labor Reports 623 (1944).

Cooperation on Enforcement

Although the vast majority of cases arising under the National Labor Relations Act are settled by the National Labor Relations Board during the informal stages of proceedings, a small but significant number of cases are reconciled only after the Board obtains a court enforcing order.⁶³ Of necessity, court review of an N.L.R.B. order is time consuming. It entails all the legal requirements of the judicial process, and often results in appeals to the Supreme Court of the United States. Labor organizations and employees are often compelled to wait many months for relief from unfair labor practices while a case is being processed in the courts.

To short-circuit the delay entailed by such court proceedings, the N.W.L.B. adopted the wartime expedient of enforcing N.L.R.B. decisions. Under the assumption that the effective prosecution of the war would be advanced by this policy, the N.W.L.B. declared that it would use its powers "to effectuate the decisions of the N.L.R.B."⁶⁴ Upon one occasion the N.W.L.B. directed an employer to comply with a circuit court of appeals decree enforcing an N.L.R.B. order. In rendering this order, the N.W.L.B. stated that "the decision of the N.L.R.B. affirmed by the Court of Appeals must and will be given full faith and credit by this Board. The decisions of the N.L.R.B. are recognized by the Board at whatever stage they may have reached. For the purposes of the N.W.L.B. they are assumed to be valid unless and until they are reversed by a superior authority."⁶⁵ In another case, the N.W.L.B. enforced an N.L.R.B. order directing an employer to disestablish a company-dominated union and to reinstate discriminatorily discharged workers, even though the employer contended that his business was not within the jurisdiction of the National Labor Relations Board.⁶⁶ The War Labor Board invited the union involved to submit the issues *de novo* to its own offices if subsequent court proceedings found that the N.L.R.B. had no jurisdiction over the company. Another company-dominated union was ordered disestablished by the N.W.L.B. where the N.L.R.B. had previously issued a similar directive.⁶⁷ In addition, an N.L.R.B. order directing an employer to bargain collectively with a labor organization was subsequently enforced by the National War Labor Board.⁶⁸

Management and labor differed sharply in their views with respect to the propriety of this N.W.L.B. policy. As might be expected, employees

⁶³ National Labor Relations Act, Sec. 10(e) empowered the Board to petition any circuit court of appeals of the United States for the enforcement of its orders. During the fiscal year 1945, only 69 per cent of all cases were closed after court action. National Labor Relations Board, *Tenth Annual Report* (1945), p. 84. In 1944, 91.1 per cent of all cases were closed short of court action. National Labor Relations Board, *Ninth Annual Report* (1944), p. 82.

⁶⁴ *In re Phelps-Dodge Corporation*, 11 War Labor Reports (1943), 71, 72.

⁶⁵ *In re Lebanon Steel Foundry*, 2 War Labor Reports (1942), 282, 285.

⁶⁶ *In re Baltimore Transit Company*, 8 War Labor Reports 122 (1943).

⁶⁷ *In re Western Cartridge Company*, 4 War Labor Reports 427 (1942).

⁶⁸ *Supra*, *in re Lebanon Steel Foundry*.

acclaimed the practice inasmuch as it afforded them relief from employer unfair labor practices short of the long delay occasioned by court proceedings. On the other hand, some employers contended that the action of the N.W.L.B. deprived them of their right to appeal N.L.R.B. decisions to the federal courts.⁶⁹ To satisfy this objection, the N.W.L.B. assured the right of appeal to employers by providing that compliance with an order of the N.W.L.B. enforcing an N.L.R.B. decision would "be without prejudice and subject to the right of the company to prosecute pending litigation involving the validity of said order to its final conclusion."⁷⁰ In this manner an employer would not be deprived of his right to a court review of an N.L.R.B. order merely because he complied with an N.W.L.B. decision. At all times the N.W.L.B., moreover, deferred to any court action with respect to N.L.R.B. orders. In the event that an employer appealed an N.L.R.B. decision to the federal courts, and the court agreed to review the N.L.R.B. ruling, the N.W.L.B. forthwith suspended any order it may have previously issued in the case.⁷¹ The N.W.L.B., of course, immediately revoked in its entirety any order enforcing an N.L.R.B. decision where a court subsequently reversed the N.L.R.B. ruling.⁷²

To safeguard employer interests still further, the N.W.L.B. reversed an earlier policy of ordering compliance with N.L.R.B. trial examiners' "Intermediate Reports." In order to afford immediate relief to workers, the N.W.L.B. at one time directed employers to comply with the recommendations of the National Labor Relations Board trial examiners. Such trial examiners' findings, of course, are always rendered previous to the final determination of a case by the N.L.R.B. itself.⁷³ On one occasion a trial examiner found that an employer refused to bargain collectively with a labor organization, and on these grounds, the N.W.L.B. directed the employer to bargain with the union involved.⁷⁴ In another case the N.W.L.B. ordered an employer to reinstate thirty-one workers when another trial examiner determined that they had been unlawfully discharged.⁷⁵ Though the findings of trial examiners are frequently adopted by the N.L.R.B., there is, of course, no obligation on the Board to approve their recommendations. In the light of this fact, it would appear that the policy of the N.W.L.B. in this respect was highly questionable. Consequently the N.W.L.B. finally decided that "the mere filing of an N.L.R.B.

⁶⁹ National Labor Relations Act, Sec. 10(f) provided that an employer aggrieved by a final order of the Board "may obtain a review of such order in any circuit court of appeals of the United States."

⁷⁰ *In re Acme Evans Milling Company*, 6 War Labor Reports (1943), 163, 164.

⁷¹ *In re Baltimore Transit Company*, 8 War Labor Reports 500 (1943).

⁷² *In re Sun Shipbuilding & Drydock Company*, 7 War Labor Reports 472 (1943).

⁷³ See National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, July 12, 1944, p. 21.

⁷⁴ *In re Rolbal Corporation*, 7 War Labor Reports 500 (1943).

⁷⁵ *In re Carter Carburetor Corporation*, 6 War Labor Reports 565 (1943).

Trial Examiner's report finding an unfair labor practice ought not to afford a ground for action by us [N.W.L.B.] since the Trial Examiner's report may be reversed."⁷⁶

It can scarcely be charged that the National War Labor Board improperly invaded the jurisdictional area of the N.L.R.B. by enforcing the latter Board's orders. The N.W.L.B. effected compliance with the Wagner Act short of court action, and still protected the employers' right to appeal N.L.R.B. decisions. The N.W.L.B. activities in this respect conserved energy, time, and money for the government, employees, and employers. By enforcing N.L.R.B. orders, it would appear that the N.W.L.B. promoted the war production program by eliminating possible sources of labor conflict.

Application of Wagner Act Principles to Intrastate Activities

Enacted by the federal government, the National Labor Relations Act of necessity has application only to labor disputes affecting interstate commerce.⁷⁷ Despite the expanded concept of interstate commerce as developed by the Supreme Court, the N.L.R.B. is nonetheless precluded from exercising its powers over a rather large area of industrial activities which fall within the intrastate category. Though a few states have enacted "little Wagner Acts"⁷⁸ the vast majority of intrastate workers do not enjoy statutory protection of their right to self-organization and collective bargaining. Consequently the N.L.R.B. obviously did not object to N.W.L.B. assumption of jurisdiction over intrastate disputes which included either unfair labor practice or representation issues. In fact the N.L.R.B. and the N.W.L.B. reached an agreement whereby the latter Board exercised authority in collective bargaining disputes which involved domestic servants, agriculture workers,⁷⁹ small independent retailers, building construction, and service industries, without any prior reference to the N.L.R.B. Only when there was a material doubt as to whether a dispute involved intrastate or interstate activities was the N.W.L.B. first to consult the N.L.R.B.⁸⁰ Within the sphere of intrastate activity, therefore, the N.W.L.B. was free to settle disputes involving organizational activities in the same manner as the N.L.R.B. is empowered to do so within the area of interstate commerce.

In one matter an employer, engaged in intrastate commerce, refused to bargain with any of three labor organizations which claimed to represent his employees. To resolve the dispute the Sixth Regional War Labor Board (Chicago) assumed jurisdiction of the case. Duplicating N.L.R.B.

⁷⁶ *Sixth Regional War Labor Board Manual, op. cit.*, p. 2.

⁷⁷ National Labor Relations Act, Sec. 2(6).

⁷⁸ See *supra*, pp. 18-21, for additional treatment of this problem.

⁷⁹ These two categories of employees were expressly exempted from the terms of the Wagner Act. National Labor Relations Act, Sec. 2(3).

⁸⁰ *Sixth Regional War Labor Board Manual, op. cit.*, p. 5.

precedents, the N.W.L.B. defined an appropriate unit for collective bargaining, held a representation election among the employees, and certified the victorious union.⁸¹ Following the example of the Chicago R.W.L.B., the Dallas Regional Board intervened in another intrastate organizational dispute. In this case an employer discharged a group of employees for alleged union activities. Consequently the Dallas Board set up a panel to hear the controversy and to make recommendations of how to dispose of the case "to prevent a work stoppage . . . which might interfere with the effective prosecution of the war."⁸² Another typical case involved an employer engaged in intrastate commerce who resorted to dilatory tactics to forestall the negotiation of a contract. Accordingly the Kansas City Regional War Labor Board set out in simple and clear terms just what the employer had to do in order to attempt in good faith to execute the contract. Specifically the Kansas City Board recommended to the employer several time-tested N.L.R.B. precedents, which included (1) delegation by the company to one of its principal officers the required power to execute the contract; (2) consideration in good faith the proposals of the union, and the making of counter-proposals if the union's terms were not acceptable; (3) proving to the union by presentation of data why the company was unable to afford a wage increase, if the company contended such a defense; and (4) reducing any agreement reached between the two parties into a written contract.⁸³

In 1944, the N.W.L.B. limited somewhat its activities in collective bargaining disputes which involved intrastate commerce. At that time the Board adopted the policy of refusing to determine the bargaining representatives of workers engaged in intrastate commerce. This rule was apparently rendered because the Board feared that it would be swamped with the duties incidental to the certification of bargaining agents. On this point the N.W.L.B. stated that a contrary policy would require the Board to accept the "virtual role of a statutory labor relations board, in states where local legislatures had not seen fit to act. This is a role for which the Board is not equipped and one which it will not assume."⁸⁴ But to the extent that the National War Labor Board extended the principles of the Wagner Act in unfair labor practice cases to the area of intrastate commerce, the N.W.L.B. attempted to eliminate a prolific source of industrial strife.

Reinstatement of Discriminatorily Discharged Employees

In order to implement the purposes of the Wagner Act, Congress empowered the National Labor Relations Board to order employers to re-

⁸¹ *In re Austin Company*, 8 War Labor Reports 189 (1943).

⁸² *Labor Relations Reporter*, August 16, 1943, vol. 12, p. 882.

⁸³ *Labor Relations Reporter*, October 11, 1943, vol. 13, p. 168.

⁸⁴ *In re Atlanta and Savannah Laundries, Inc.*, 14 War Labor Reports 11 (1944).

instate with back pay workers unlawfully discharged.⁸⁵ Notwithstanding the fact that the Wagner Act confers exclusive authority on the N.L.R.B. to prevent and adjust unfair labor practice cases,⁸⁶ (which, of course, includes discriminatory discharge disputes), and despite the limitations placed on the National War Labor Board,⁸⁷ the latter agency in an early case ordered the reinstatement of ten workers allegedly discharged "without proper cause."⁸⁸ Apparently the N.W.L.B. rationale for assuming jurisdiction over a reinstatement case was that the union involved in the controversy had the choice of utilizing either the offices of the N.L.R.B. or the N.W.L.B. According to the N.W.L.B., nothing in the Wagner Act compels a union or an employee to request the N.L.R.B. to reinstate workers allegedly unlawfully discharged. Consequently the National War Labor Board believed that the procedures afforded by the Wagner Act had been "exhausted" by the mere refusal of the labor organization to file charges with the N.L.R.B.⁸⁹ And inasmuch as the Wagner Act's procedures had been "exhausted," the N.W.L.B. asserted that it could entertain the dispute without improperly invading the N.L.R.B. jurisdictional area.

In further justifying its activities in this respect, the N.W.L.B. intimated that the labor organization filing the charge might have either engaged in a strike to effect the reinstatement of the workers, or it could have filed its complaint with the N.W.L.B. Since a strike would have interfered with the prosecution of the war, the N.W.L.B. contended that it could properly settle the matter. The N.W.L.B. based its right to adjust discriminatory discharge cases on the fact that (1) such disputes threatened to interfere with war production; and (2) the labor union refused to file the case with the N.L.R.B. thereby "exhausting" the procedure of the Wagner Act.

As noted, the N.W.L.B. provided a forum in which labor disputes, including those involving unfair labor practices, might be swiftly settled. Unlike the procedures contained in the Wagner Act, the N.W.L.B. was not required to petition any court for the enforcement of its orders. Consequently one would expect labor unions to by-pass the N.L.R.B. and file complaints with the N.W.L.B. inasmuch as it appeared that the N.W.L.B. could render better "service" to the unions than could the N.L.R.B. Desiring the speedier remedy afforded by the N.W.L.B., the labor organization in the instant case filed its dispute with this agency, and not with the N.L.R.B. In rendering its decision in the matter, the N.W.L.B. declared that "it would seem obvious that the discharge without 'proper

⁸⁵ See National Labor Relations Act, Sec. 10(c).

⁸⁶ See *supra*, p. 121, n. 32.

⁸⁷ See *supra*, p. 120, n. 31.

⁸⁸ *In re Frank Foundries Corporation*, 3 War Labor Reports (1942), 223, 228

⁸⁹ See *supra*, pp. 121-122.

cause' of any employee in a plant engaged in war production is likely to create employee unrest and hence to impede war production by disturbing the morale of the workers."⁹⁰

It is noteworthy that in the *Frank Foundries* case the issue of discriminatory discharge was not presented squarely to the N.W.L.B. However, in a later case, the N.W.L.B. ordered the immediate reinstatement of nineteen employees who were discharged discriminatorily.⁹¹ Another instance involved a strike allegedly induced by employer unfair labor practices.⁹² In this case the employer replaced the strikers with other employees. When the N.W.L.B. heard the case, it directed the employer to reinstate the strikers, but without back pay, notwithstanding the fact that the employer had hired new workers to replace the strikers.⁹³ In deciding this case the N.W.L.B. was moved to declare that it was "impressed with the fact that both the union and the company in their requests and arguments occasionally sound as if they were appealing before the N.L.R.B. itself and not before a War Labor Board panel."⁹⁴ But even though the N.W.L.B. apparently affirmed the fact that it could not assume the jurisdiction of the N.L.R.B., the former agency nevertheless ordered the strikers reinstated.

In spite of the fact that the National War Labor Board would not consider a reinstatement dispute when the matter had been previously filed with the N.L.R.B.,⁹⁵ the N.L.R.B. felt that the N.W.L.B., by assuming jurisdiction of any reinstatement cases, had unwisely exceeded its authority. Consequently in a joint conference attended by members of both Boards, an agreement was reached whereby the N.W.L.B. abandoned the policy of directing the reinstatement of discriminatorily discharged employees. On this point the N.W.L.B. declared that "it was agreed that in all cases of complaints about discharges the War Labor Board ought not to act unless the number of men discharged was so large a group that their remaining out would interfere with the war effort."⁹⁶ Notwithstanding the agreement reached in the joint conference, the N.W.L.B. subsequently ordered a single worker reinstated on the ground that no allegation of anti-union discrimination was made.⁹⁷ Even though the employee involved was the chairman of the union bargaining committee and was dismissed by the company for a reason found to be unsubstantiated in fact

⁹⁰ *In re Frank Foundries*, *op. cit.*, p. 228.

⁹¹ *Supra*, *In re Western Cartridge Company*.

⁹² *In re Montag Brothers, Inc.*, 6 War Labor Reports 355 (1943).

⁹³ This N.W.L.B. decision reflected a basic N.L.R.B. policy. See *N.L.R.B. v. Mackay Radio & Telegraph Company*, 304 U.S. 333 (1938).

⁹⁴ *In re Montag Brothers, Inc.*, *op. cit.*, p. 358.

⁹⁵ *In re Corcoran Metal Products Company*, 5 War Labor Reports 323 (1942).

⁹⁶ *Sixth Regional War Labor Board Manual*, *op. cit.*, p. 2. During the conference the N.L.R.B. pointed out that the courts have held that if an employer cannot show any just cause for discharging a man, the inference is inescapable that he was discharged for union activities. Accordingly, the N.W.L.B. also agreed not to accept discharge cases wherein the alleged reason for discharge constituted "without good cause."

⁹⁷ *In re Centrifugal Fusing Company*, 11 War Labor Reports 577 (1943).

the N.W.L.B. directed his reinstatement, and evidently believed such a decision was in accord with the joint agreement. Apparently, however, the *Centrifugal Fusing* case was an isolated exception to the accord between the agencies, and the N.W.L.B. adhered to the agreement with the salutary result of reducing confusion over the two Boards' respective jurisdictions.

Limited Recognition

In considering the experiences of the National Defense Mediation Board it was noted that the N.L.R.B. ruled that an employer did not violate the Wagner Act if he executed individual contracts with several unions representing their members only, pending an N.L.R.B. certification of the exclusive bargaining agent. On the basis of this N.L.R.B. interpretation, the N.D.M.B. recommended to an employer involved in such a controversy to execute contracts with the various unions covering only their members.⁹⁸ Utilizing these precedents the N.W.L.B. similarly directed employers to grant such limited recognition.⁹⁹ It should be stressed that this policy was adopted only as a temporary measure, and the limited recognition arrangement was to cease when the N.L.R.B. had determined an exclusive bargaining agent.¹⁰⁰ Accordingly the N.W.L.B. ruled that an employer discontinue the recognition of a minority union "for the handling of grievances," where another labor organization had been subsequently certified by the N.L.R.B.¹⁰¹ This employer action was required even though the minority union possessing the limited recognition plan was a legitimate and non-company-dominated or assisted labor organization.

But in the absence of an N.L.R.B. certification the N.W.L.B. did not hesitate to direct an employer to grant competing legitimate unions limited recognition. One typical case involved a representation controversy involving three competing unions — a C.I.O. affiliate, an A.F.L. union, and an independent labor organization.¹⁰² Rejecting the employer's contention that he would violate the Wagner Act if he were to recognize the three unions, the N.W.L.B. ordered him to recognize the three rival labor organizations as representatives of their own members for the presentation of grievances.¹⁰³ To support the order, the N.W.L.B. pointed out that the N.L.R.B. had previously ruled that an employer did not engage in an

⁹⁸ National Defense Mediation Board, Case No. 108, *In the matter of Nevada Consolidated Copper Corporation*, certified to the N.D.M.B. on November 29, 1941. See p. 109.

⁹⁹ See *In re Virginia Electric and Power Company*, 1 War Labor Reports 74 (1942).

¹⁰⁰ National War Labor Board, *Summary of Decisions of the National War Labor Board*, January 12, 1942 to February 15, 1943, vol. 1, p. 49.

¹⁰¹ *Labor Relations Reporter*, October 18, 1943, vol. 13, p. 186.

¹⁰² *In re Thompson Products Company, Inc.*, 4 War Labor Reports 384 (1942).

¹⁰³ An employer, in reality, does engage in an unfair labor practice if he grants any recognition to a minority union whenever there is an N.L.R.B. certified union in the plant. *In the matter of Elbe File and Binder Company*, 2 N.L.R.B. 906 (1937). *In the matter of Sands Manufacturing Company*, 1 N.L.R.B. 546 (1936), reversed on other grounds in 306 U.S. 332 (1939).

unfair labor practice if he recognized competing unions in the absence of an N.L.R.B. certification.

Beyond objecting to such an arrangement on legal grounds, employers also contended that recognition of uncertified unions would result in intense competition between the unions in the plant for new members with ensuing industrial unrest.¹⁰⁴ However, the N.W.L.B. regarded as more important the argument that some collective method had to be established to adjust workers' grievances pending the designation of an exclusive bargaining agent. Otherwise the National War Labor Board in effect would have apparently given silent support to the settlement of grievances on an individual basis—a practice inconsistent with the public policy of encouraging collective bargaining. In this connection, labor organizations contended that the absence of such temporary grievance machinery had "a deleterious effect on morale" which threatened to give rise to disputes endangering the war effort.¹⁰⁵ According to one trade union, employees should not have been required to wait for the establishment of grievance machinery "until the impending and probable extended litigation in the N.L.R.B. case is concluded."¹⁰⁶

Unlike the National Defense Mediation Board, however, the N.W.L.B. ordinarily refused to require employers to execute a contract with an uncertified union covering general conditions of work. It was noted that the N.D.M.B. recommended to an employer that he execute a contract with a union representing only its members which embraced wages, hours, and other important conditions of work.¹⁰⁷ In only one instance did the N.W.L.B. order the execution of a contract establishing general conditions of employment where the parties involved were an employer and an uncertified labor union which represented only its members. And even this agreement was made subject to any subsequent certification by the N.L.R.B.¹⁰⁸ Even though a labor organization proved beyond doubt that it possessed the support of a majority of the workers within a plant, the N.W.L.B. still refused to direct the execution of a general contract in the absence of an N.L.R.B. certification. Though the N.W.L.B. declined to order the execution of such general contracts, the agency, however, invariably required the establishment of some sort of machinery whereby labor organizations were able to adjust their members' grievances.¹⁰⁹

¹⁰⁴ *In re Thompson Products Company, op. cit.*, p. 388.

¹⁰⁵ *In re Sun Shipbuilding and Drydock Company*, 3 War Labor Reports (1942), 404, 406.

¹⁰⁶ *In re Baltimore Transit Company*, 4 War Labor Reports (1942), 363, 366.

¹⁰⁷ *Supra*, National Defense Mediation Board, Case No. 108.

¹⁰⁸ *In re U.S. Cartridge Company*, 2 War Labor Reports 96 (1942). In commenting on this atypical order, the War Labor Board stated "in only one case . . . had the W.L.B. ordered more than such a limited form of recognition." National War Labor Board, *op. cit.*, p. 49.

¹⁰⁹ *In re Tennessee Schuykill Corporation*, 6 War Labor Reports 290 (1943); *In re Sperry Gyroscope Company*, 1 War Labor Reports 167 (1942), *In re Sun Shipbuilding and Drydock Corporation*, 3 War Labor Reports 404 (1942).

Thus the N.W.L.B. was reluctant to order the execution of general contracts by an employer with a labor organization not certified by the N.L.R.B.¹¹⁰ A contrary rule might have engendered industrial unrest inasmuch as eventual N.L.R.B. proceedings might have resulted in the certification of a labor organization which was not the contracting union. But to provide employees with an interim method of reconciling grievances, the N.W.L.B. frequently ordered an employer to grant limited recognition to uncertified unions. The N.W.L.B. refused to state exactly what the term "grievances" constituted. Instead the Board declared that the term "grievances" defied "clear cut and precise definition," and that "any rigid definition in a grievance procedure designed to eliminate disputes threatening the war effort [might] very well defeat the procedure itself."¹¹¹ In one case, however, the N.W.L.B. sharply limited the construction of the term by ruling that "grievances" was not to be "construed as including any matter properly the subject of collective bargaining."¹¹²

Experience proved, however, that the policy of the N.W.L.B. with respect to directing limited recognition was not wholly satisfactory. For example, in one instance the N.L.R.B. ordered the disestablishment of a labor organization alleged to be company-dominated. On these grounds, the War Labor Board ordered the company to set up a grievance procedure for two outside unions.¹¹³ When the company appealed the N.L.R.B. ruling, a court upheld the alleged unlawful union, and the N.W.L.B. of necessity recognized the "damage done to the disestablished union."¹¹⁴ To prevent further repetition of such instances, the N.W.L.B. subsequently agreed with the N.L.R.B. that where one union was not certified but recognized by a company, the N.W.L.B. would direct limited recognition of another labor organization in only "exceptional circumstances." It was further agreed that the N.W.L.B. would not establish grievance procedures for uncertified and unrecognized competing unions where a representation petition was pending without first consulting with the National Labor Relations Board.¹¹⁵ In accordance with this new policy, the N.W.L.B. later refused to direct an employer to grant limited recognition to an uncertified union.¹¹⁶

¹¹⁰ On the other hand, the N.W.L.B. did not hesitate to direct an employer to execute contracts with N.L.R.B. certified unions. See *In re Ohio Public Service Company*, 2 War Labor Reports 144 (1942).

¹¹¹ *In re Sun Shipbuilding and Drydock Company*, 3 War Labor Reports (1942), 404, 407.

¹¹² *In re Sperry Gyroscope Company*, *op. cit.*, p. 171.

¹¹³ *In re Sun Shipbuilding and Drydock Company*, 3 War Labor Reports 404 (1942).

¹¹⁴ *Sixth Regional War Labor Board Manual*, *op. cit.*, p. 2.

¹¹⁵ *Ibid.*, p. 1.

¹¹⁶ *In re Harry Davies Moulding Company*, 11 War Labor Reports (1943), 188, 189. It is noteworthy that the N.W.L.B. in this case rejected the recommendation of the mediation officer who urged such limited recognition be awarded because the N.W.L.B. had applied such a remedy "in other cases where no representative for the purpose of collective bargaining had been determined by the N.L.R.B." Needless to say that the mediation officer rendered his recommendation prior to the agreement worked out in joint conference by the officials of the N.L.R.B. and the N.W.L.B.

The Problem of Union Security

As indicated earlier, the National Defense Mediation Board at times granted labor organizations a measure of security short of the closed shop by employing the maintenance of membership device.¹¹⁷ In this connection the N.L.R.B. had previously ruled that an employer did not engage in an unfair labor practice if he executed an agreement containing a maintenance of membership clause.¹¹⁸ Similar to the policy of the N.D.M.B., the National War Labor Board also awarded the maintenance of membership device to labor organizations. Unlike the first N.W.L.B., which had no authority to adjust a union security issue involving the requirement of membership in a union as a condition of employment, the second N.W.L.B. believed that the maintenance of membership clause represented a compromise formula between the closed and open shop.¹¹⁹

Prime consideration of whether or not the N.W.L.B. would grant the maintenance of membership plan depended on whether the measure would promote industrial harmony and further the maximum production of war material.¹²⁰ Labor organizations, furthermore, which failed to adhere to the wartime no-strike pledge, failed to elect its officers in a democratic manner, or refused to make audited financial reports to its members ordinarily were not awarded this union security measure.¹²¹ Once granted the clause ordinarily read as follows:

All employees who, 15 days after the date of the Directive Order of the National War Labor Board in this case are members of the union in good standing in accordance with the constitution and by-laws of the Union, and those employees who may thereafter become members shall, during the life of the agreement, as a condition of employment, remain members of the Union in good standing.¹²²

An analysis of the standard provision reveals that the clause did not compel any worker to join a union as a condition of employment. It permitted, moreover, the opportunity to any employee to withdraw from a union within fifteen days after the contract was directed. Although the N.W.L.B. once required that a majority of union members approve the

¹¹⁷ National Defense Mediation Board, Case No. 46, *In the matter of Federal Shipbuilding and Dry Dock Company*, certified to the N.D.M.B. on June 30, 1941.

¹¹⁸ United States Labor Statistics Bureau, *Bulletin 714, Report on the Work of the National Defense Mediation Board*, p. 260. See also *In the matter of Mohawk Cotton Mills*, 51 N.L.R.B. 257 (1943), in which the N.L.R.B. ruled that employees discharged because of their failure to remain union members under a maintenance of membership arrangement were not discharged in violation of the Wagner Act.

¹¹⁹ McNatt, "The Union Security Issue," *op. cit.*, p. 69. On this point, W. C. Morse, a public member of the N.W.L.B., declared "the Board sought a solution that would protect the union and its members from the weakening effect of the nonstrike agreement and without penalizing the employer. To grant a closed shop could be to decree a national policy in direct contravention of the President's statement of November 14, 1941, that the Government of the United States will not order nor will Congress pass legislation ordering a so-called closed shop. To order an open shop would result in continual friction between unions and management, great expenditure of time and energy by the union in membership campaigning, picket lines, abortive and wildcat strikes, general industrial unrest and would have a seriously detrimental effect upon production."

¹²⁰ *In re International Harvester Company*, 1 War Labor Reports 112 (1942).

¹²¹ *In re Humble Oil and Refining Company*, 15 War Labor Reports 380 (1944).

¹²² *In re Bethlehem Steel Corporation et al.*, 1 War Labor Reports (1942), 324, 327.

maintenance of membership arrangement in a secret election as a prerequisite to its award,¹²³ such a policy was dropped in subsequent instances.¹²⁴ Experience indicated that the N.W.L.B. made frequent use of this plan. It is reported that between January 12, 1942, and February, 1944, the measure was awarded by the N.W.L.B. in 271 instances out of a possible 291 cases in which the maintenance of membership issue was involved.¹²⁵ In fact the N.W.L.B. ordinarily granted the device "unless some definite reason could be shown for denying the union's request."¹²⁶ Thus the N.W.L.B. customarily awarded the maintenance of membership arrangement unless it could be proved that the labor organization involved was irresponsible or otherwise unworthy of the union security measure.

Of greater apparent significance than the mere award of the maintenance of membership plan, however, was the momentous announcement made by the N.W.L.B. that in the interest of stable labor relations the discontinuance of the closed shop or of a maintenance of membership arrangement would not be ordered during the war.¹²⁷ For example, a closed shop contract possessed by a labor organization would be protected from challenge for the duration of the war. Such a policy, the N.W.L.B. contended, would eliminate union membership raiding, unwarranted organizational activities, and in general would promote war production by stabilizing labor relations. Accordingly the National War Labor Board stated that "as a general rule, a company except by mutual consent of the parties cannot abandon a union shop already established by the parties."¹²⁸ This meant in practice that, where existent, closed shops or maintenance of membership plans would be frozen for the duration of the war, and the employees of the plants affected by these security measures could not change their bargaining agents.

Freedom to Choose Bargaining Representatives

This N.W.L.B. union security doctrine contrasted sharply with one of the most basic policies of the National Labor Relations Board. Freedom of choice of bargaining representatives by employees in secret elections constituted one of the most fundamental guarantees afforded by the provisions of the Wagner Act.¹²⁹ In administering the National Labor Relations Act, the N.L.R.B. has ruled, however, that employees may not change bargaining representatives capriciously and without regard to industrial stability. Injudicious switching of bargaining representatives

¹²³ *In re International Harvester Company*, *op. cit.*, p. 120.

¹²⁴ *In re Atlas Powder Company*, 5 War Labor Reports 371 (1942).

¹²⁵ *In re Humble Oil and Refining Company*, *op. cit.*, p. 383.

¹²⁶ *In re Atlas Powder Company*, *op. cit.*, p. 375.

¹²⁷ *In re Harvil Aircraft Die Casting Corporation*, 6 War Labor Reports 334 (1943).

¹²⁸ *Ibid.*, p. 335.

¹²⁹ National Labor Relations Act, Sec. 7, declared that "employees shall have the right . . . to bargain collectively through representatives of their own choosing"

may easily engender industrial unrest; but on the other hand freezing of bargaining agents for unduly protracted periods appears inconsistent with labor's right to freedom of choice of representatives. To resolve this problem of freedom of choice as against industrial stability, the N.L.R.B. adopted the general policy of protecting contracts or certifications for a period of one year.¹³⁰ In general, a contract executed by an employer with a legitimate labor organization will constitute a bar to another N.L.R.B. representation proceeding for twelve months.¹³¹ Similarly, in the interest of orderly collective bargaining, an N.L.R.B. certified union is immune from attack for a like period.¹³²

During the war years the N.L.R.B. policy of ordinarily immunizing certified labor unions and legitimate collective bargaining agreements from challenge for a period of twelve months was reaffirmed. In one such case the Board declared that "not to hold a valid exclusive bargaining contract a bar to a determination of representatives during its initial term of one year . . . would tend to increase industrial unrest rather than to promote industrial peace."¹³³ To discourage the practice of union membership raiding, and to forestall union-breaking activities of some hostile employers, the N.L.R.B., in some instances, even directed that employers bargain with certified unions which had lost their majority status.¹³⁴ It was reasoned that by requiring an employer to bargain with a union previously certified for a one-year period, regardless of whether or not it maintained a majority status, membership raiding and union breaking would be discouraged and stable labor relations would be advanced.¹³⁵ Furthermore in the interest of stability the N.L.R.B. sometimes allowed a contract to stand as a bar to representation proceedings for a period of longer than the customary year.¹³⁶ Similarly, where there were signs of union raiding, the N.L.R.B. refused to entertain a representation petition

¹³⁰ See *In the matter of Superior Electrical Products Company*, 6 N.L.R.B. (1938), 19, 22. The N.L.R.B. declared in this case that a contract running for a year "is not for such a long period of time as to be contrary to the policies or purposes of the Act." But a five year contract did not constitute a bar to a representation proceeding. *In the matter of Metro-Goldwyn Mayer Studio*, 7 N.L.R.B. 662 (1938). Similarly in the *Columbia Broadcasting System* case (8 N.L.R.B. 508, 1938) the Board permitted a rival union to petition for an election after one year of an inside union's contract had elapsed, neither could the majority status of a certified union ordinarily be questioned before the elapse of one year. *In the matter of Whittier Mills Company*, 15 N.L.R.B. 457 (1939).

¹³¹ On the other hand, contracts covering members only and contracts made with a company-dominated union do not preclude bargaining elections. National Labor Relations Board, *Seventh Annual Report* (1942), p. 55.

¹³² *In the matter of Minneapolis-Moline Power Implement Company*, 14 N.L.R.B. 920 (1939).

¹³³ *In the matter of Pressed Steel Car Company, Inc.*, 36 N.L.R.B. (1941), 560, 563.

¹³⁴ This rule was upheld by the Supreme Court of the United States in *Franks Brothers Company v. N.L.R.B.*, 64 S. Ct. 817 (1944). See also *In the matter of the Bohn Aluminum & Brass Corporation*, 57 N.L.R.B. 1684 (1944).

¹³⁵ However, a certification would not stand in the way of new representation proceedings during the initial year when (1) the labor organization is unable to function as a bargaining agent, (2) there is defection of substantially the entire union membership; and (3) the certified union has formally been dissolved. National Labor Relations Board, *Eighth Annual Report* (1943), p. 47.

¹³⁶ *In the matter of Mill "B," Inc.*, 40 N.L.R.B. 346 (1942). Here the N.L.R.B. permitted a contract to stand for two years.

even though a two-year contract had already run for one year.¹³⁷ Likewise where the execution of a contract had been delayed for seven months after certification, the N.L.R.B. granted immunity to the labor organization for twelve months beyond the first seven.¹³⁸ In another case the N.L.R.B. refused to disturb an existing certification for one year after the execution of a collective bargaining agreement even though nine months elapsed before the contract was consummated.¹³⁹

In deference to the National War Labor Board, to reward a patient union, and in general to promote labor peace, the N.L.R.B. at times refused to institute new representation proceedings when a certified labor organization was involved in proceedings before the National War Labor Board.¹⁴⁰ Because of a heavy docket, several months sometimes elapsed before the N.W.L.B. was able to direct the execution of a contract which involved an N.L.R.B. certified union. As could be expected, newly designated N.L.R.B. exclusive bargaining agents at times became engaged in controversies with employers over wages, hours, and other conditions of work. Aware of labor's no-strike pledge, these unions ordinarily submitted such disputes to the N.W.L.B. instead of resorting to the strike. To reward such labor organizations the N.L.R.B. at times immunized their certifications for an additional year, even though the N.W.L.B. delayed the execution of contracts involving such labor unions for a period of several months.¹⁴¹ On this point the N.L.R.B. declared that, although the result of the policy

is to extend immunity from a reinvestigation of its status as such, we are of the opinion that that result is justified and required by the exigencies of wartime labor relations. For the duration of the war, a majority of labor organizations have agreed not to exercise their right to strike, and the Federal Government has set up agencies to arbitrate differences between employers and employee representatives. In adhering to the no-strike pledge and taking advantage of the peaceful means of settlement provided by the Government, labor unions may be forced into inactivity during the sometimes slow processing of their disputes . . . in the interest of stable and orderly collective bargaining, we believe that a measure of protection should be afforded to newly recognized or newly certified unions, which, without fault, are placed in that position.¹⁴²

However the mere fact that a union had a case pending with the N.W.L.B. did not always mean an extension of the customary immunization period. This qualification became necessary because some labor organizations, whose year's period of protection was about to expire,

¹³⁷ *In the matter of Owens-Illinois Pacific Coast Company*, 36 N.L.R.B. 990 (1941).

¹³⁸ *In the matter of Kimberly-Clark Corporation*, 61 N.L.R.B. 90 (1945).

¹³⁹ *In the matter of Omaha Packing Company*, 67 N.L.R.B. 304 (1946). But compare *In the matter of Carson Pirie Scott & Company*, 69 N.L.R.B. 935 (1946) where the N.L.R.B. ordered a new election only three months after the original certification because the union members had overwhelmingly voted to change affiliation.

¹⁴⁰ *In the matter of Allis-Chalmers Manufacturing Company*, 50 N.L.R.B. 306 (1943).

¹⁴¹ *In the matter of Taylor Forge & Pipe Works*, 58 N.L.R.B. 1375 (1944).

¹⁴² *Ibid.*, p. 1379. The N.L.R.B., applied the same policy *In the matter of Kennecott Copper Corporation*, 51 N.L.R.B. 1140 (1943).

conveniently filed dispute cases with the N.W.L.B. To stop this abuse, the N.L.R.B. adopted the rule that ordinarily a union's immunization would not extend beyond a two-year period regardless of N.W.L.B. negotiations.¹⁴³

To resolve the conflict between freedom of choice of representatives and stability in labor relations, the N.L.R.B., as demonstrated, adopted the "one-year rule." When factors of labor stability outweighed the considerations for freedom of choice, the N.L.R.B. at times modified the policy and protected collective bargaining contracts or certifications for a longer period of time. Out of respect to the N.W.L.B., the N.L.R.B., moreover, under certain conditions extended the one-year immunity period when certified labor organizations resorted to the N.W.L.B. to resolve disputes instead of attempting to reconcile them by striking. However the N.L.R.B. most emphatically rejected the N.W.L.B. contention that a maintenance of membership arrangement or a closed shop plan, once obtained, should be immunized from attack for the duration of World War II. Not only did the N.L.R.B. point out that such a policy was wholly inconsistent with the right of freedom of choice of bargaining representatives, but the agency affirmed that the N.W.L.B. doctrine did not promote industrial peace or stability in labor relations. On this score the N.L.R.B. vigorously declared that

there is nothing that is more likely to breed discontent among the employees or make for irresponsible union leadership than a policy which deprives workers of any voice in the conduct or identity of their representatives for an unreasonable length of time. Perhaps an appearance of stability may be achieved by a contract of extended duration, but the ephemeral quality of such stability is no better exemplified than in the case now before us. That there is now an acrimonious dispute concerning the representation of the employees here is conceded by all the parties. Such disputes constitute a threat to industrial peace and the flow of war production. We believe that to deny to employees the opportunity to select new bargaining representatives after a reasonable time serves to aggravate rather than minimize discord and to remove the foundation upon which stability may be based.¹⁴⁴

Such opposing views could have led to serious controversy between the National War Labor Board and the National Labor Relations Board. For example, a serious jurisdictional clash might have arisen had an outside labor organization requested the N.L.R.B. to conduct a representation election while a rival inside union petitioned the N.W.L.B. for a

¹⁴³ *In the matter of Cole-Hersee Company*, 56 N.L.R.B. 653 (1944). Neither did institution of proceedings with the N.W.L.B. protect a union against representation proceedings when the union engaged in dilatory tactics before the N.W.L.B. *In the matter of Bethlehem Supply Company*, 56 N.L.R.B. 439 (1944); nor where there existed no substantial disagreement between the parties to the dispute filed with the N.W.L.B. *In the matter of Michigan Light Alloys Corporation*, 58 N.L.R.B. 113 (1944).

¹⁴⁴ *In the matter of the Trailer Company of America*, 51 N.L.R.B. (1943) 1107, 1111. See also *In the matter of Memphis Furniture Mfg. Company*, 51 N.L.R.B. 1147 (1943). See also *In the matter of Rutland Court Owners, Inc.*, 44 N.L.R.B. (1942), 587, 594 in which the Board stated that "the mere fact that all closed shops are not unlawful, by virtue of the [National Labor Relations Act] is no reason for holding that closed shops be made perpetual because validly initiated pursuant to the [Wagner Act]."

renewal of a closed shop arrangement or of a maintenance of membership plan. If the N.W.L.B. extended the closed shop, and the N.L.R.B., in a representation proceeding, certified the outside union, the employer could have violated the Wagner Act if he adhered to the terms of the N.W.L.B. award. Under these circumstances the N.W.L.B. in effect would have compelled the employer to violate a federal law. Unlike other issues which gave rise to controversies between the N.L.R.B. and the N.W.L.B., the officials of the two Boards, in a joint conference, failed to agree on a satisfactory solution to the problem. In this respect, the N.W.L.B. declared that "the N.L.R.B. feels very strongly that it would not be consistent with the Wagner Act for us to take the position that the mere adoption of a maintenance of membership clause freezes the bargaining unit for the duration . . . we could arrive at no definite rule in regard to those cases and thought that the best thing to do was simply to confer in advance of action as each case arises."¹⁴⁵

In practice, however, as a pertinent case demonstrated, the N.W.L.B. apparently deferred to the judgment of the N.L.R.B. Thus in one case an A.F.L. affiliated labor organization requested renewal of its maintenance of membership plan. But an outside C.I.O. union had previously filed an election petition with the National Labor Relations Board. A commission of the N.W.L.B., investigating the controversy, rejected the A.F.L. union's petition and stated that no ruling on the security clause would be made until the N.L.R.B. determined the bargaining agent.¹⁴⁶ The commission declared that the N.W.L.B. had established the policy in such cases that "the provisions of the National Labor Relations Act would not be infringed in any way."¹⁴⁷ In this manner the N.W.L.B. apparently modified its earlier view and accepted the position of the N.L.R.B. that employees have the right to change bargaining agents at reasonable periods of time during the war years.

Authority to Issue Collective Bargaining Orders

In a previous section, it was pointed out that the National War Labor Board consistently refused to designate the unit for collective bargaining and uniformly declined to certify bargaining representatives. Once a union was certified by the N.L.R.B., the N.W.L.B., however, upon many occasions directed employers to bargain with the majority labor organization.¹⁴⁸ Frequently, when a recalcitrant employer refuses to bargain with an N.L.R.B. designated bargaining representative, the full procedure

¹⁴⁵ *Sixth Regional War Labor Board Manual, op. cit.*, p. 5.

¹⁴⁶ *Labor Relations Reporter*, vol 12, p 629, June 28, 1943. The rule of the commission was approved by the N.W.L.B. It is noteworthy that the conference between the two Boards in which the N.L.R.B. strongly objected to the N.W.L.B. policy with respect to the freezing of representatives was held only about a month before the decision was rendered in the instant case.

¹⁴⁷ *Ibid.*, p. 630.

¹⁴⁸ *National War Labor Board, op. cit.*, p. 50.

of the Wagner Act must be exhausted before compliance with the Act is realized. Of necessity, such proceedings are time consuming. After a charge is filed the N.L.R.B. investigates the merits of the controversy.¹⁴⁹ If the charge is substantiated by sufficient evidence, a complaint is ordinarily issued. A formal hearing is then held before an N.L.R.B. trial examiner who subsequently reports his findings and recommendations to the Board in Washington. Upon the basis of the trial examiner's "Intermediate Report," together with other evidence subsequently introduced, the N.L.R.B. reaches a decision in the case. After the N.L.R.B. ruling is issued, an employer, who believes himself aggrieved by the order, still has the opportunity to appeal the case to a federal circuit court, and even to the Supreme Court of the United States.¹⁵⁰ It has been found that in the ordinary wartime unfair labor practice case, a median interval of 125 days elapsed from the time that a charge was filed with the N.L.R.B. until a hearing was conducted.¹⁵¹ Approximately two additional months were required from the time that the Board itself took jurisdiction of a case until it rendered a decision.¹⁵² Thus a labor organization instituting an unfair labor practice case was often required to wait approximately six months from the filing date until the N.L.R.B. rendered a decision. Much more delay, of course, occurred in those cases in which employers appealed Board rulings to the federal courts.

Faced with such protracted proceedings, some labor organizations involved in wartime unfair labor practice cases asserted that the N.L.R.B. enforcement procedure in World War II was not wholly satisfactory.¹⁵³ To support this contention it was pointed out that labor had given its no-strike pledge for the duration of the war period. During peacetime, labor organizations may strike to compel an employer to comply with principles of the Wagner Act. Though such strikes are to be discouraged, it remains essentially true that in the ordinary unfair labor practice cases employers engaging in unlawful conduct are more likely to comply with the Wagner Act during the period of N.L.R.B. informal investigation when they are aware that employees could strike to effect quick enforcement. On the other hand, during the war years, recalcitrant employers, mindful of their employees' no-strike pledge, could have delayed the implementation of their workers' rights by fully exhausting the N.L.R.B. procedure in collective bargaining cases. Under such circumstances a union might have disintegrated because its members, dissatisfied with the organization's inability to engage in effective collective bargaining, would have tended to leave the organization. Accordingly N.L.R.B. certified labor organiza-

¹⁴⁹ National Labor Relations Board, *Ninth Annual Report* (1944), p. 12.

¹⁵⁰ National Labor Relations Act, Sec 10(f).

¹⁵¹ National Labor Relations Board, *Eighth Annual Report* (1943), p. 13.

¹⁵² *Ibid.*, p. 14.

¹⁵³ *In re Pacific Gas and Electric Company*, 4 War Labor Reports 68 (1942).

tions involved in these situations frequently requested the National War Labor Board to issue orders directing employers to bargain collectively.¹⁵⁴ Unlike the N.L.R.B., the N.W.L.B., if it desired, could effectively dispose of such a case in a relatively short time. In this manner, the necessary delay occasioned by the full exhaustion of N.L.R.B. procedures in collective bargaining unfair labor practice cases would be short-circuited.

Some employers, however, charged that the National War Labor Board unlawfully exceeded its authority when the agency issued such bargaining orders. It was generally argued that the National Labor Relations Act confers exclusive jurisdiction upon the N.L.R.B. to prevent unfair labor practices, and gives the federal courts the right to review N.L.R.B. orders.¹⁵⁵ However, the National War Labor Board rejected this contention on the ground that the position did not square with war-time conditions. The N.W.L.B. ruled that it possessed proper authority to dispose of such unfair labor practice cases because of their threat to "interrupt work contributing to the effective prosecution of the war."¹⁵⁶ With respect to employers' desires to exhaust their rights under the Wagner Act, the N.W.L.B. declared that such "procedural procrastination is a peacetime luxury which must be sacrificed in the interests of war production."¹⁵⁷ In regard to the legality of its conduct, the N.W.L.B. declared that nothing in its creating executive orders or in Congressional legislation precluded it from directing an employer to bargain with an N.L.R.B. certified union.¹⁵⁸ On this point the N.W.L.B. again asserted that when a labor organization merely refused to file an unfair labor practice charge with the N.L.R.B., the procedure provided for in the Wagner Act had been exhausted. In this connection the N.W.L.B. stated that there are "no procedures under the National Labor Relations Act by which the union is required to file such a charge."¹⁵⁹

Accordingly an N.L.R.B. certified union, confronted with an employer who refused to bargain collectively, was able to seek relief from either of

¹⁵⁴ It should be stressed that the N.W.L.B. refused to issue such an order unless the union was properly certified by the National Labor Relations Board. See *In re Tennessee Schuykill Corporation*, 6 War Labor Reports 290 (1943).

¹⁵⁵ *In re Pacific Gas and Electric Company*, *op. cit.*, p. 76.

¹⁵⁶ *In re Shell Oil Company*, 3 War Labor Reports (1942), 296, 302.

¹⁵⁷ *Labor Relations Reporter*, June 14, 1943, vol. 12, p. 555. The N.W.L.B. also took the position that some employers were only attempting to postpone the day when they had to bargain collectively. Thus an employer who refuses to bargain with an N.L.R.B. certified union frequently contends that the unit for bargaining designated by the N.L.R.B. is not "appropriate." However, the Supreme Court has ruled that an N.L.R.B. determination ordinarily may not be disturbed by the courts. On this point, the Supreme Court in *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146 (1941), stated that the courts are forbidden to set aside a bargaining unit determination by the N.L.R.B. as long as the N.L.R.B. exercises its power to designate the unit in a reasonable manner and supports its findings with evidence. See also *N.L.R.B. v. Hearst Publications*, 322 U.S. 111 (1944); *Inland Empire District Council v. Mulh*, 325 U.S. 697 (1945); *International Association of Machinists v. N.L.R.B.*, 8 S.Ct. 83 (1940).

¹⁵⁸ Of importance here is the restriction in Executive Order 9017, dated January 12, 1942, that the jurisdiction of the N.W.L.B. "does not apply to labor disputes for which procedures for adjustment or settlement are otherwise provided until these procedures have been exhausted."

¹⁵⁹ *In re Shell Oil Company*, *op. cit.*, p. 301.

the two Boards. Labor unions, therefore, had the opportunity to short-circuit the comparative time consuming N.L.R.B. procedural requirements. Taking advantage of this situation, some labor organizations did resort to the offices of the N.W.L.B. instead of those of the N.L.R.B. to effect collective bargaining.¹⁶⁰ Whether or not the N.W.L.B. exceeded its authority in this respect appears questionable. Certainly the N.W.L.B. did nothing that was inconsistent with the substantive provisions of the Wagner Act. Instead the N.W.L.B. offered a ready and speedy means whereby an N.L.R.B. certified labor union, bound to labor's no-strike pledge, was able to seek prompt relief of a serious unfair labor practice. It might be reasonably argued that the policy of the National War Labor Board in this respect was necessary to supplement labor's wartime no-strike pledge.

The Chicago Transformer Case

Under the terms of the Wagner Act an employer who believed that an uncertified labor organization did not possess the support of a majority of his employees could test the majority status of the union by refusing to bargain collectively with its representatives. Faced with such an employer, a labor organization could file an unfair labor practice charge with the National Labor Relations Board. To determine whether the employer actually engaged in an unfair labor practice, the N.L.R.B. ordinarily conducted a secret election to establish the majority status of the union.¹⁶¹ This determination of majority status was necessary because an employer did not violate the Wagner Act if he refused to bargain with a minority union.¹⁶² If the representation proceedings proved that the labor organization did represent a majority of the employees, the N.L.R.B. would ordinarily certify the union, and the employer would then be under legal compulsion to grant exclusive recognition to the certified union and to bargain collectively with its agents. As indicated before,¹⁶³ an employer could not ordinarily challenge the majority status of a certified union until after a year has elapsed from the date of certification.¹⁶⁴ But after a year has passed, an employer who doubted the majority status of the certified union could again test the majority status of the labor organization by refusing to bargain with its representatives.

In the interest of promoting stability in labor relations during the war years, the National War Labor Board, however, adopted the policy of ordering employers to extend recognition of a previously certified union

¹⁶⁰ See *In re J. I. Case Company*, 2 War Labor Reports 113 (1942); *In re Ohio Public Service Company*, 2 War Labor Reports 144 (1942); *In re Pacific Gas and Electric Company*, 4 War Labor Reports 68 (1942); *In re Shell Oil Company*, 3 War Labor Reports 296 (1942); *In re Utah Copper Company*, 14 War Labor Reports 80 (1944); *In re Bethlehem-Fairchild Shipyards, Inc.*, 17 War Labor Reports 803 (1944).

¹⁶¹ *Ibid.*, Sec. 9(a) and 8(5). ¹⁶² National Labor Relations Act, Sec. 9(c).

¹⁶³ See *supra*, p. 139.

¹⁶⁴ *In the matter of Whittier Mills Company*, 15 N.L.R.B. 457 (1939).

beyond the usual one-year period.¹⁶⁵ Such a rule was adopted in the celebrated *Chicago Transformer* case. In this case an employer refused, after the termination of one contract, to bargain or to negotiate a new contract with an N.L.R.B. certified labor organization on the ground that the labor organization had lost its majority status. Specifically the employer contended that a reasonable period of time had elapsed since the original N.L.R.B. certification of the union, and that he was under no legal compulsion to negotiate with the union because it had lost (according to his belief) its majority support. Moreover, he pointed out that under N.L.R.B. procedures an employer could not petition for a representation election unless two or more rival unions are competing for recognition.¹⁶⁶ Under normal conditions, he urged, an employer could refuse to bargain collectively, and the N.L.R.B. would institute representation proceedings to determine the majority status of the labor organization. Furthermore it was contended that if the representation proceedings resulted in another certification, the employer could appeal the N.L.R.B. certification to the courts. But now, he complained, the National War Labor Board directed that he extend a contract with a labor organization of a doubtful majority status. Finally the company pointed out that compliance with the N.W.L.B. order might have caused the employer to violate the National Labor Relations Act by granting recognition to a minority union.

The employer correctly contended that he would have been able to file a representation petition with the N.L.R.B. if there had been more than one union involved in the dispute. Similarly had there been a rival labor organization involved, such a petition probably would have been instituted by one of the competing unions. But inasmuch as only one union was involved, one might question whether the employer's refusal to bargain was motivated wholly by legal considerations, or whether he was merely attempting to avoid collective bargaining. Accordingly the N.W.L.B., anxious to maintain continuous wartime collective bargaining, directed the employer to negotiate a new contract with the labor organization. In rejecting the argument that the practical effect of the N.W.L.B. order would deprive the employer of the right of court review of an N.L.R.B. certification, the N.W.L.B. pointed out that labor had voluntarily given up its chief economic weapon, the strike, for the duration of the war. On this score the N.W.L.B. declared that it doubted "whether this 'right' of the employer — the right to invite a test as to whether he is in violation of

¹⁶⁵ *In re Chicago Transformer Corporation*, 14 War Labor Reports 666 (1944).

¹⁶⁶ See National Labor Relations Board, *Rules and Regulations*, Series 2, July 14, 1939, Article III, Sec. 2(b), p. 12. The Labor-Management Relations Act, 1947, Sec. 9(c)B, permits an employer to request a bargaining election even though only one labor organization presents to him a claim to be recognized as the bargaining representative of his employees. No election, however, may be held in any bargaining unit within which, in the preceding twelve months' period, a valid election shall have been held.

the law — is the sort of right which he is entitled to protect at all costs during a war. But apart from that, this right is not the only right involved. No less pertinent is the right of the union to strike. The real question before us here is to balance these rights . . . the rather tenuous right which the employer seeks to insert in this case, and the right of the union to strike which was given up for the war.”¹⁶⁷ In other words the N.W.L.B. recognized the fact that the union could not morally strike for union recognition during the war years. Accordingly the N.W.L.B. order, extending its recognition period, tended to compensate for labor’s relinquishment of the right to strike.

Furthermore the N.W.L.B. pointed out that nothing in the Wagner Act invalidates an N.L.R.B. certification of a labor organization merely because a contract expires. Consequently the N.W.L.B. refused to decide whether the N.L.R.B. certification was inoperative and instead ruled that any N.L.R.B. certification was conclusive unless “there are the strongest reasons in the particular case for following some other course.”¹⁶⁸ One of these “reasons” could not be the argument that continued recognition of a certified labor organization might result in a violation of the Wagner Act because, according to the N.W.L.B., an employer could not plead his own violation of law to avoid bargaining.¹⁶⁹ In short, the N.W.L.B. declared that until a body of competent jurisdiction ruled that an employer did engage in an unfair labor practice, the employer had no reason to believe that he violated any law. This rule, of course, proceeded from a basic assumption of Anglo-Saxon law that a person is innocent until proved guilty. Even though an employer and the N.L.R.B. were involved in a court proceeding involving a representation dispute, the N.W.L.B. would still order the employer to bargain with the previously certified union. However, the N.W.L.B. ruled that in the event of court invalidation of the certification, the employer had the right to petition the N.W.L.B. for a termination of the recognition order.¹⁷⁰

In one case, however, the N.W.L.B. did find sufficient cause to depart from the policy of ordering the extension of a contract with an N.L.R.B. certified union.¹⁷¹ The employer involved successfully established a doubt in the minds of the members of the N.W.L.B. as to the union’s majority status by introducing evidence which indicated that the company, during the period of the old contract, experienced a large labor turnover and that the union involved was certified two years before the instant proceeding. Under these circumstances, the N.W.L.B. recommended that the labor organization petition the N.L.R.B. for a redetermination of its certifica-

¹⁶⁷ *In re Chicago Transformer Corporation*, op. cit., p. 669.

¹⁶⁸ *Ibid*, p. 668.

¹⁶⁹ *In re Pearson Candy Company, Ltd.*, 9 War Labor Reports 679 (1943).

¹⁷⁰ *In re City National Bank & Trust Company of Chicago*, 22 War Labor Reports 468 (1945).

¹⁷¹ *In re Montgomery Ward & Company*, 13 War Labor Reports 454 (1944).

tion. Ordinarily, however, the N.W.L.B. refused to issue this recommendation. If the N.W.L.B. had directed unions to petition the N.L.R.B. for a renewal of certifications every time employers doubted their majority status, the N.L.R.B. would probably have been swamped with representation petitions. Moreover, some employers might have seriously impaired the collective bargaining process by doubting the majority status of a union each time a contract was up for renewal. Such labor organizations would have been compelled to request the N.L.R.B. to redetermine their majority status almost every year. This process would have provided an interval in which bargaining representatives would have been uncertain and industrial strife and diminution of war production might have resulted.

As a result of the *Chicago Transformer* case, some employers urged that the N.L.R.B. liberalize its rules with respect to employer certification petitions. It was urged that the N.L.R.B. accept company election petitions whenever the employer was involved in an N.W.L.B. proceeding.¹⁷² Supporters of the proposal¹⁷³ pointed out that the adoption of the amendment would have afforded employers, faced with an N.W.L.B. order to extend a contract with a union, with the opportunity to challenge the organization's majority status. In this manner an employer could not have been compelled to execute a contract with a minority union.

Advocates of this proposal apparently ignored the fact that only one labor organization was involved in representation controversies of the *Chicago Transformer* type. If there were more than one union involved, an employer or any of the interested labor organizations could have filed a representation petition with the N.L.R.B. But inasmuch as only one union was a party to the *Chicago Transformer* type of dispute, it may be doubted whether an affected employer was actually concerned with the possibility of executing a contract with a minority union. As noted, these employers might have merely desired to avoid collective bargaining. Moreover, such a proposal appears objectionable because it likely would have led to frequent interruptions of the collective bargaining process. Had the proposal been adopted, the N.W.L.B. probably would have refused to order the extension of contracts while a representation dispute was pending before the N.L.R.B. The status of bargaining representatives in the interim period would have been uncertain and disturbed industrial relations probably would have resulted. Finally, employers might have swamped the N.L.R.B. with representation petitions, and the effective wartime administration of the Wagner Act might have been precluded.

¹⁷² "Employer Petitions: Proposed N.L.R.B. Rules," *Labor Relations Reporter*, May 22, 1944, vol. 14, p. 345.

¹⁷³ Apparently Reilly, a former member of the N.L.R.B., joined with the National Association of Manufacturers and the U. S. Chamber of Commerce in advocating this amendment to the N.L.R.B. rules. See *Labor Relations Reporter*, May 29, 1944, vol. 14, p. 377.

Because of these considerations, the N.L.R.B. rejected the proposed change.¹⁷⁴

However, the N.L.R.B., by an administrative ruling, did afford employers confronted with an N.W.L.B. directive to extend a contract with the opportunity to petition for a "construction" of a labor organization's majority status. But the N.L.R.B. carefully reserved the right to refuse to act on these construction petitions. Only if the N.L.R.B. believed that a request had merit was a hearing instituted to determine whether or not certifications should be withdrawn. In one typical case, the N.L.R.B. directed a decertification hearing when an employer, ordered by the N.W.L.B. to renew a collective bargaining contract, proved that the company had recently experienced an unusual amount of employee turnover, and further adduced competent evidence showing that a large number of employees disavowed the certified union involved as their bargaining representative.¹⁷⁵

With the end of hostilities the N.L.R.B. rescinded the "construction petition" policy.¹⁷⁶ In rendering a postwar decision, the N.L.R.B. pointed out that with the end of the war the authority of the National War Labor Board was terminated, and an employer had no further need to be concerned with the consequences of violating N.W.L.B. orders.¹⁷⁷ As before the war, an employer who doubted the majority status of a union could refuse to bargain with its representatives, and the union's majority status would then be tested in an N.L.R.B. representation proceeding. Thus a measure designed to accommodate a wartime condition was quickly dropped by the N.L.R.B. upon the termination of the conflict.

Conclusions

In order that World War II labor disputes might be settled in a peaceful manner, the National War Labor Board was created. Both the President and the Congress, anxious to preserve intact all National Labor Relations Act rights, enjoined the N.W.L.B. from issuing any directive inconsistent with National Labor Relations Board rulings. From this consideration, it appeared that the N.L.R.B., in war as in peace, was to have exclusive jurisdiction over all organizational disputes.

Under the assumption, however, that organizational controversies threatened uninterrupted war production, the N.W.L.B., despite the apparent intent of the President and of the Congress, broadly construed its powers and took action over some matters normally subject to N.L.R.B.

¹⁷⁴ Although a hearing was held on May 19, 1944, by the N.L.R.B. in which consideration was given to the proposition (*Labor Relations Reporter*, May 22, 1944, vol. 14, p. 345), the N.L.R.B. rejected the proposal. See National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, July 12, 1944, Article III.

¹⁷⁵ *Labor Relations Reporter*, August 13, 1945, vol. 16, p. 809.

¹⁷⁶ *In the matter of Colonial Life Insurance Company*, 65 N.L.R.B. 58 (1945).

¹⁷⁷ *In the matter of the Cincinnati Times-Star Company*, 66 N.L.R.B. 414 (1946).

authority. Thus the N.W.L.B. directed the reinstatement of employees discriminatorily discharged, and ordered employers to bargain with N.L.R.B. certified labor organizations. On the other hand, the National War Labor Board consistently refused to designate bargaining units, declined to conduct representation elections, and refused to certify bargaining agents.

Additional analysis further disclosed that the N.W.L.B. deferred to the N.L.R.B. whenever the latter tribunal indicated that the N.W.L.B. had unwisely utilized its powers. Accordingly, upon the request of the National Labor Relations Board, the National War Labor Board abandoned the practice of directing the reinstatement of unlawfully discharged employees. In addition the N.W.L.B. altered its wartime union security policy after the N.L.R.B. pointed out that the original program denied employees the right to select new bargaining agents after a reasonable time. As a result, the N.W.L.B. subsequently refused to extend a labor union's closed shop or maintenance of membership arrangement whenever the organization's majority status was being challenged in an N.L.R.B. representation proceeding. Finally, the N.W.L.B. complied with another N.L.R.B. recommendation and awarded competing uncertified trade unions a limited recognition status in only exceptional cases.

Apart from these considerations, the National War Labor Board, within the limits of its authority, attempted to implement the principles of the National Labor Relations Act. As noted, the N.W.L.B. directed employers to bargain collectively with N.L.R.B. certified unions. In addition, the N.W.L.B. frequently ordered employers to comply with N.L.R.B. rulings and thereby effectuated Wagner Act principles short of court proceedings. Moreover, the National War Labor Board, aware of the jurisdictional limitations of the N.L.R.B., extended the principles of the National Labor Relations Act to intrastate commerce.

It can scarcely be concluded that the National War Labor Board compromised rights guaranteed by the Wagner Act. Though the agency invaded the normal N.L.R.B. jurisdictional area, the fact remains that the N.W.L.B. accepted the supremacy of the N.L.R.B. over organizational disputes and deferred to the National Labor Relations Board upon most occasions. Finally, the available evidence indicates that the N.W.L.B. attempted to extend the collective bargaining process by implementing National Labor Relations Act principles wherever appropriate.

IMPLEMENTATION OF FAIR EMPLOYMENT PRACTICE COMMITTEE PRINCIPLES

Powers of the Committee

In the spring of 1943 the President of the United States issued Executive Order 9346 which established the Fair Employment Practice Committee.¹ By creating the Committee the President sought to relieve the nation's critical wartime labor shortage by attempting to promote the fullest utilization of all available manpower. National policy, as defined in the Order, encouraged the use of all employees regardless of their race, creed, color, or national origin.² Under the terms of the creating Order, the F.E.P.C. was directed to implement the national policy. Specifically, the Committee was empowered to (1) formulate policies to achieve the purposes of the Order; (2) make such recommendations as it deemed necessary and proper to the various Federal departments and agencies and to the President; (3) recommend to the Chairman of the War Manpower Commission appropriate measures for bringing about the full utilization and training of manpower in and for war production without discrimination because of race, creed, color, or national origin; (4) receive and investigate complaints of illegal discrimination; (5) conduct hearings and make findings of fact; and (6) take appropriate steps to obtain the elimination of such discrimination.³

To carry out the national policy still further, the Order required that all contracting agencies of the government include in all agreements negotiated a provision obligating the contractor not to discriminate against any employee or applicant for employment because of race, color, or national origin. All departments and agencies of the government concerned with vocational and training programs for war production were further directed to take all necessary measures to assure that such programs were administered without discrimination because of race, creed, or national origin.⁴

Jurisdiction

As the purpose of the Executive Order creating the F.E.P.C. was to eliminate discriminatory employment practices within war industries, the Committee's authority extended to all employers engaged in war production. No question of proper jurisdiction existed in matters involving an employer producing war material under contract with the government.

¹ Executive Order 9346, dated May 27, 1943.

² Previously the same policy was implemented by Executive Order 8802, dated June 25, 1941, and Executive Order 8823, dated July 18, 1941.

³ Executive Order 9346, par. 4 and 5.

⁴ *Ibid.*, par. 1 and 2.

On the other hand, it was necessary for the Committee to decide in each case whether it could properly assume authority over an alleged discriminatory case concerning an employer engaged in war production, but not a party to a government contract. To resolve this problem, the F.E.P.C. utilized as a guide the "War Manpower Commission's List of Essential War Industries."⁵ Thus an employer who discriminated against an employee because of race, for example, was properly subject to the jurisdiction of the F.E.P.C. as long as he was engaged in an undertaking certified as a war industry by the War Manpower Commission, regardless of whether he was producing war material under government contract. As noted, the Order purported to eliminate all discrimination in federally financed vocational and training programs; accordingly the power of the F.E.P.C. extended over all federal agencies involved in such programs. Finally, inasmuch as some trade unions have engaged in discriminatory practices, the authority of the F.E.P.C. embraced all labor organizations whose members were engaged in war production.

Forms of Discrimination

During the period of its operation⁶ the F.E.P.C. settled satisfactorily approximately 5000 cases. Included in this figure were 40 strikes which were caused by race problems. During the last year of the war the Committee held 15 public hearings, docketed 3485 cases, and settled 1191 cases.⁷ Not all cases filed with the F.E.P.C. had merit, for the F.E.P.C. during the period July 1, 1943, to December 31, 1944, dismissed approximately 64 per cent of all cases docketed for lack of merit, insufficient evidence, or for other causes.⁸ Of all cases filed with the F.E.P.C. during July 1, 1943, to June 30, 1944, 69.4 per cent or 2833 cases involved charges against private business. Complaints against federal agencies numbered 988, or 24.5 per cent of the total. In 250 instances, or 6.1 per cent of the total cases, complaints were filed against labor unions.⁹

Of all cases docketed with the Committee during the fiscal year 1944, 3298, comprising 80.8 per cent of the total, represented allegations of discrimination because of race. In 355, or 8.7 per cent of all matters, charges of discrimination were made because of religion. Most of these, 72.7 per cent came from Jews. Discrimination because of national origin accounted for 253 complaints or 6.2 per cent of all charges. Of this total, the vast majority, or 182 cases comprising 71.9 per cent, stemmed from Mexican complaints. Finally, aliens filed 4.3 per cent of all cases docketed with the Committee during the period under consideration. In total, charges received from Negroes, Jews, and Mexicans accounted for nearly

⁵ Fair Employment Practice Committee, *First Report, July, 1943-December, 1944*, p. 47.

⁶ Congress refused to extend the life of the Fair Employment Practice Committee beyond June 30, 1946.

⁷ *Labor Relations Reporter*, July 8, 1946, vol. 18, p. 187.

⁸ Fair Employment Practice Committee, *op cit.*, p. 2.

⁹ *Ibid.*, p. 39.

90 per cent of all complaints docketed, of which 78 per cent were filed by Negroes.¹⁰

Forms of discrimination charged against employers or federal agencies included refusal to hire, unwarranted dismissal, refusal to upgrade, and discriminatory working conditions. Of these, refusal to hire was cited in 1900 or 46.6 per cent of all cases docketed in the fiscal year 1944.¹¹ Forms of labor union discrimination included refusal to refer, refusal to upgrade, refusal to handle grievances, refusal to grant seniority, refusal to issue work permits, and refusal to admit to membership.¹² Obviously when a union holds a closed shop contract, denial of membership becomes tantamount to a denial of employment. The F.E.P.C. found that labor union discrimination was a major wartime problem, stating in this respect that evidence proved that "in 1941 . . . nine A.F.L. nationally affiliated unions still had constitutional provisions barring Negroes from membership, along with seven unaffiliated organizations. In addition, numerous unions continued to discriminate against Negro workers, excluding them by tacit consent and constitutional ritual and by segregating them into auxiliaries."¹³

Implementation of the National Policy

With respect to enforcement of orders, the F.E.P.C. compared its power to that possessed by the National War Labor Board. The Committee justified its authority to issue directives on the same basis as advanced by the N.W.L.B. Since both agencies derived their authority from executive orders or legislation which did not in themselves provide for enforcement measures, but instead implied that the ultimate enforcement authority was the President of the United States, the Fair Employment Practice Committee contended that its directives were as valid as those of the National War Labor Board. Thus the war powers of the President could be applied to enforce F.E.P.C. orders in all cases in which the President believed that seizure of war plants was necessary to promote the production of war material.¹⁴ Despite this Presidential authority, the F.E.P.C., recognizing its own inability to enforce its orders, welcomed the support of other government agencies in furthering the national policy of non-discrimination. On this point the F.E.P.C. declared that "Government Departments, the War Manpower Commission, the Army, Navy and Maritime Commission . . . have resolved a great many discriminating situations. Thus, effective support of Executive Order 9346 has been given freely by many agencies."¹⁵

¹⁰ *Ibid.*, p. 37. ¹¹ *Ibid.*, p. 42. ¹² *Ibid.*, pp. 49, 132.

¹³ Fair Employment Practice Committee, *F.E.P.C. — How It Operates* (1944), p. 11.

¹⁴ *Labor Relations Reporter*, January 24, 1944, vol. 13, p. 614.

¹⁵ Fair Employment Practice Committee, *First Report*, p. 3.

As integral parts of the government, it was expected that all federal agencies would be under obligation to implement the national policy as expressed in Executive Order 9346.¹⁶ Thus some agencies, such as the War and Navy Departments, which actually administered government war contracts were directly responsible for the execution of national policy. Other federal agencies, which did not administer such agreements, but whose activities could be of importance in the advancement of the policy of non-discrimination, also actively implemented the Presidential Order. On this point, the F.E.P.C. declared that among these latter agencies was "notably" the N.L.R.B.¹⁷ The National War Labor Board also implemented the national policy in appropriate circumstances.¹⁸

Cooperation on Enforcement

As noted, the National Labor Relations Board, a federal agency, was obligated to promote the national policy of non-discrimination. Of course the Board could not enjoin an employer from engaging in unfair employment activities. This was the primary duty of the Fair Employment Practice Committee. Neither could the N.L.R.B. properly direct labor organizations to cease engaging in such unfair practices. On this point the N.L.R.B. declared that it "has no express authority to remedy undemocratic practices within the structures of union organizations."¹⁹ Thus the N.L.R.B. recognized the fact that it possessed no authority to compel unions, for example, to open their membership to Negroes. However, the N.L.R.B. is authorized to determine the unit for collective bargaining and is empowered to certify bargaining representatives. Accordingly the N.L.R.B., to advance national policy, could withhold certifications from labor unions which discriminated against minority groups.

In fact the N.L.R.B., in a series of decisions, did rule that labor organizations which discriminated against employees because of race or color would not be certified as statutory bargaining agents. In one case, the N.L.R.B. stated that: "We entertain grave doubt whether a union which discriminatorily denies membership to employees on the basis of race may nevertheless bargain as the exclusive representative in an appropriate unit composed in part of members of the excluded race."²⁰ The Board further pointed out the possible consequences that could arise from certification of such a labor organization. If such a union obtained a closed shop contract from an employer, all members of the excluded race would of necessity be discharged pursuant to the contract because they would be

¹⁶ Specifically, the preamble to Executive Order 9346 states that "... it is the policy of the United States to encourage full participation in the war effort by all persons in the United States regardless of race, creed, color, or national origin, in the firm belief that the democratic way of life within the nation can be defended successfully only with the help and support of all groups within its borders." ¹⁷ Fair Employment Practice Committee, *op. cit.*, p. 60.

¹⁸ *War Labor Reports*, vol. 8, p. 714.

¹⁹ *In the matter of Larus & Brother Company*, 62 N.L.R.B. (1945), 1075, 1082.

²⁰ *In the matter of the Bethlehem-Alameda Shipyards, Inc.*, 53 N.L.R.B. (1943), 999, 1016.

denied membership in the labor organization. This circumstance, the N.L.R.B. declared, would be in "variance with the purposes of the [Wagner] Act."²¹

Not only did the N.L.R.B. refuse to certify labor organizations which engaged in discriminatory practices, but the Board also indicated that it would actually decertify these unions. In one case the N.L.R.B. certified an A.F.L. affiliated union as the exclusive bargaining agent for a unit which included Negroes. Immediately after the certification, the A.F.L. union segregated the colored people into a separate unit. Then the union executed a contract with the employer which excluded the Negroes from its terms. Nonetheless the union applied the "check-off" to the non-whites, and the contract further required that the excluded members pay dues to the A.F.L. union as a condition of employment. Such unequal treatment, the N.L.R.B. declared, constituted "... a clear abuse of the standard of conduct imposed upon the exclusive representative under ... the [Wagner] Act."²² When an N.L.R.B. trial examiner rendered his report in the instant matter, he recommended decertification of the union because it had "engaged in discriminatory segregation running counter not only to the Board's enunciated policy, but also the national policy expressed by the President of the United States."²³ On another occasion the N.L.R.B. certified a union which was to bargain for both colored and white workers. Upon awarding the certification, the Board cautioned the union that "if it is later shown, by an appropriate motion, that the Union has denied equal representation to any such employees because of his race, color, creed, or national origin, we will consider rescinding any certificate which may be issued herein."²⁴ Thus the N.L.R.B., within the limits of its authority, attempted to implement the national policy of non-discrimination. In effect the Board has ruled that a certified labor organization must represent all employees of a bargaining unit equally and without discrimination because of race, national origin, or creed.²⁵

On the other hand, the N.L.R.B. certified a labor organization²⁶ which segregated colored members into a separate local union.²⁷ To support this

²¹ *Ibid.*, p. 1016. ²² *In the matter of Larus & Brother Company*, p. 1084.

²³ Fair Employment Practice Committee, *op. cit.*, p. 61.

²⁴ *In the matter of Carter Manufacturing Company*, 59 N.L.R.B. (1944), 804, 806.

²⁵ The Supreme Court has also held that a statutory bargaining agent must afford equal representation to all members of the bargaining unit. In *Steele v. Louisville & Nashville Railway Company*, 323 U.S. (1944), 192, 203 the high Court ruled that a union acting as an exclusive bargaining representative under the terms of the Railway Labor Act may not rely upon its status as a legal bargaining agent to place Negroes in the bargaining unit at a disadvantage with respect to promotions and seniority. Specifically the Court declared that a legal bargaining agent has "a duty to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them." The same conclusion was reached by the Supreme Court in *Tom Tunstall v. Brotherhood of Locomotive Firemen and Engineers*, 323 U.S. 210 (1944). See also *Wallace Corporation v. N.L.R.B.*, 323 U.S. 248 (1944).

²⁶ United Brotherhood of Carpenters and Joiners of America (A.F.L.).

²⁷ *In the matter of the Atlantic Oak Flooring Company*, 62 N.L.R.B. 973 (1945).

position the Board pointed out that the parent union had never discriminated against members because of race or creed, and that the organization had always provided equal representation and equal privileges to both white and colored locals. Apparently unequal treatment of Negro members must accompany segregation before the N.L.R.B. will withhold a certification. However, the Board added the usual warning to the union that it would lose its status as a legal bargaining agent if facts later demonstrated that the organization was denying equal rights to employees because of race, color, or creed.

Although the Board did not find segregation in itself sufficient to constitute a violation of national policy, the N.L.R.B. uniformly refused to set up bargaining units determined by a color line. One pertinent case involved the alteration of the ratio of skilled and unskilled workers resulting from the change in the character of production occasioned by the war.²⁸ Before the war, the appropriate unit was determined along industrial lines, and an A.F.L. union represented both skilled and unskilled workers. With conversion to war production, however, the requirements of skilled workers decreased in proportion to the needs of unskilled employees. Whereas before the war the ratio was about four skilled workers to one unskilled employee, war production requirements changed the ratio to about two and one-third unskilled workers to one skilled employee. A C.I.O. local representing the unskilled workers, who were all Negroes, requested the N.L.R.B. to designate, as before, both unskilled and skilled workers into one unit for the purposes of collective bargaining. But the A.F.L. union, representing the white skilled workers, now requested the Board to establish two units, although before the war the same union desired to represent both the skilled and unskilled employees. The A.F.L. union's contention was forthwith rejected by the N.L.R.B. as being inconsistent with the spirit of national policy. "The color or race of employees is an irrelevant and extraneous consideration in determining, in any case," the N.L.R.B. declared, "the unit appropriate for the purposes of collective bargaining."²⁹ In a postwar case, the N.L.R.B. similarly refused to establish a bargaining unit along race lines.³⁰

The N.L.R.B. has endeavored to promote fair employment practices within labor unions. By refusing to certify or by decertifying labor organizations engaging in undemocratic practices, and by refraining from establishing bargaining units according to racial considerations, the National Labor Relations Board has aided in the elimination of one of the most flagrant trade union abuses.

²⁸ *In the matter of U. S. Bedding Company*, 52 N.L.R.B. 382 (1943). ²⁹ *Ibid.*, p. 388.

³⁰ *In the matter of Colorado Fuel and Iron Corporation*, 67 N.L.R.B. (1946), 100, 103. Here the Board declared that "Although the board has diligently sought to protect the right of minority racial groups to equal fair representation, it has consistently refused to establish units based upon racial considerations."

PART III

Problems Arising Apart from Federal Legislation and Agencies

DETERMINATION OF THE APPROPRIATE BARGAINING UNIT

Before the National Labor Relations Board can certify a labor organization as the exclusive bargaining agent for a group of employees, the Board must first determine the unit appropriate for collective bargaining. In this respect the Board is statutorily enjoined to designate a unit which will insure to employees the full benefit of their right to self-organization and to collective bargaining. To implement this right, the N.L.R.B. is empowered to decide in each case whether "the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof."¹ Once the unit is determined, the Board may direct a secret ballot to establish what labor organization, if any, the employees in the unit desire as their bargaining agent. Ordinarily the victorious trade union will be certified, and the employer involved in the representation dispute must bargain collectively with the representatives of the certified labor organization.²

An inspection of the Board's rulings indicates that the agency refused to set up rigid rules as guides for the determination of the bargaining unit.³ Recognizing the complexity of modern industry, and aware of the numerous and devious forms which the organization of employees can take, the N.L.R.B. instead has affirmed the principle of flexibility in the designation of the appropriate unit.⁴ Despite the establishment of the flexibility doctrine, the Board has considered certain factors as guides in influencing the determination of the bargaining unit.⁵ One of the most important factors considered by the Board in this respect is the history of collective bargaining in the plant involved in a representation dispute.⁶ Under the assumption that traditional bargaining units effectively implement the right of workers to collective bargaining and accurately reflect the bargaining desires of employees, the N.L.R.B. has given great weight to the historical factor in the determination of the bargaining unit.

The Historical Factor in the War Years

With the conversion of industry to war production, the Board modified the former importance attached to the historical factor. Thus during the

¹ National Labor Relations Act, 49 Stat. 449, Sec. 9(b).

² *Ibid.*, Sec. 8(5).

³ National Labor Relations Board, *First Annual Report* (1936), p. 112. Here the Board stated that it would not apply "rigid rules to determine the appropriate unit in each case."

⁴ See *In the matter of Grace Line, Inc.*, 2 N.L.R.B. (1936), 369, 374 where the Board declared that "the appropriate unit in each case must be determined in the light of the circumstances in the particular case."

⁵ See pp. 16-17 for additional consideration of this issue.

⁶ National Labor Relations Board, *Ninth Annual Report* (1944), p. 33.

prewar years an automobile manufacturer operated two of his plants as independent units. One of the plants was organized by an A.F.L. affiliate and the other by a C.I.O. union. After the outbreak of the war, the two plants were utilized interdependently in the manufacture of shells. As a consequence, the N.L.R.B. classified both plants as one unit and ordered an election among all the workers.⁷ In discussing the wartime importance of the historical guide, the Board stated that "while bargaining history is relevant and often persuasive in determining the appropriate unit . . . in this case we are convinced that it is not conclusive. The conversion of the two plants to war production has produced changes so fundamental that the past history of bargaining has become an obsolete yardstick for the determination of the appropriate unit."⁸

Similarly the Board joined two former separate bargaining units despite the objections of one of the unions involved because an ordnance plant and an ordnance depot were merged.⁹ On another occasion the N.L.R.B. ordered the consolidation of former craft units notwithstanding a long prewar history of collective bargaining on the basis of separate units.¹⁰ Before the war the company involved in this case manufactured stoves, but when it converted to war production the character of its product changed to iron and magnesium castings. Though the separate craft units were appropriate during peacetime, the Board ruled that effective collective bargaining could only be realized by determination of a plant-wide unit. Aware of the changed character of the employer's products, the Board declared that "the past history of bargaining cannot be considered as controlling in the determination of the appropriate unit."¹¹

Though craft units were sometimes merged because of wartime exigencies, the N.L.R.B., departing somewhat from traditional policy, allowed war production craft employees a greater measure of freedom in the choice of bargaining agents. For many years the N.L.R.B. had held that craft workers, once included in a larger industrial unit, would be frozen indefinitely in the industrial classification.¹² Abandoning this rule, the Board, in a wartime case, decided that it would entertain a representation petition from craft members included in a larger industrial unit when it could be shown that (1) the craft employees involved constituted a true craft and not a mere dissident faction; and (2) the craft members maintained their identity throughout the period of bargaining upon a more

⁷ *In the matter of General Motors Corporation*, 45 N.L.R.B. 11 (1942).

⁸ *Ibid.*, p. 14.

⁹ *In the matter of Atlas Powder Company*, 62 N.L.R.B. 1179 (1945).

¹⁰ *In the matter of Marshall Stove Company*, 57 N.L.R.B. 375 (1944).

¹¹ *Ibid.*, p. 379.

¹² See *In the matter of West Coast Wood Preserving Company*, 15 N.L.R.B. 1 (1939); *In the matter of Minneapolis-Moline Power Implement Company*, 14 N.L.R.B. 920 (1939). The Labor-Management Relations Act, 1947, Sec. 9(b)(2), provides that the N.L.R.B. may not decide that any craft unit is inappropriate for purposes of collective bargaining merely on the basis that a different unit had been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation.

comprehensive unit and protested their inclusion in such a larger bargaining unit.¹³ When craft members were able to satisfy these prerequisites, the Board was prepared to authorize an election to determine whether the craft workers desired a separate unit or whether they chose to remain in the industrial unit.¹⁴ Moreover, if craft employees could show that the industrial unit was established without their knowledge,¹⁵ or that there was no previous consideration of the merits of a separate craft unit,¹⁶ the Board ruled that a self-determination election would be directed. Accordingly, the Board authorized an election among a group of metal polishers, formerly classified in a comprehensive unit, when the craft members proved they constituted a "true" craft and had protested their inclusion in the larger unit.¹⁷ Pressmen also were permitted to express their bargaining desires in a self-determination election despite the fact that they were formerly included in an industrial unit.¹⁸ In the light of this wartime policy, one might question the validity of the long-standing A.F.L. complaint that the N.L.R.B. is prejudiced against the craft unit.¹⁹

After the termination of the war the Board again limited the importance of the history of collective bargaining in the determination of bargaining units. While engaged in war production, a company's foundry workers and manufacturing employees had distinct and dissimilar duties. Consequently in a wartime case the N.L.R.B. classified the two categories of workers into separate bargaining units. With the reconversion to peacetime activities, the company undertook the production of castings and household equipment, and both the foundry and the manufacturing departments were integrated in the production of these peacetime products. Accordingly the N.L.R.B. subsequently grouped all the plant's employees into a single bargaining unit.²⁰ Thus in the postwar period, as well as in the war years, the Board modified the former weight attached to the history of collective bargaining. A contrary policy might have resulted in the establishment of bargaining units not suitable to changing industrial patterns.

¹³ *In the matter of General Electric Company*, 58 N.L.R.B. 57 (1944).

¹⁴ The policy established by the Board in the *General Electric Company* case differs from the "Globe doctrine." Under the terms of the latter rule, the Board affords craft members the opportunity to decide whether or not they desire to be included in a larger unit before any bargaining unit is established. See *In the matter of Globe Machine and Stamping Company*, 3 N.L.R.B. 294 (1937). On the other hand, the *General Electric* policy permits designation of a craft unit after the craft members had been previously classified in an industrial unit.

¹⁵ *In the matter of Sullivan Machinery Company*, 31 N.L.R.B. 749 (1941).

¹⁶ *In the matter of Bethlehem Steel Corporation*, 40 N.L.R.B. 923 (1942).

¹⁷ *In the matter of Balcrank, Inc.*, 66 N.L.R.B. 600 (1946).

¹⁸ *In the matter of Standard Register Company*, 67 N.L.R.B. 322 (1946).

¹⁹ Despite this extension of the "Globe doctrine" the A.F.L. in its 1944 convention again denounced the N.L.R.B. charging that the Board functions in the interest of the C.I.O. See "A.F.L. Bids Again for Labor Unity," *Labor Relations Reporter*, December 4, 1944, vol. 15, p. 396. See also pp. 33-35 for a further discussion of the problem.

²⁰ *In the matter of Portland Foundry Company*, 64 N.L.R.B. 1342 (1945). See also *In the matter of Anchor Hocking Glass Corporation*, 66 N.L.R.B. 553 (1946).

The Problem of the Expanding Unit

Under conditions of a stable labor force, the N.L.R.B. is faced with no great problem with respect to the time at which it will designate bargaining units and certify labor organizations. But the time element becomes more important under circumstances of industrial and personnel expansion. To meet the demands of war production, existing industrial facilities increased their personnel forces and newly created war plants were required to recruit entire staffs. Such a circumstance complicated the Board's certification procedure. For example, one might assume that a newly constructed war plant has begun to hire its personnel complement. Clearly, if the Board had conducted a representation election when only a small portion of the plant's workers had been recruited, the results of the poll might be quite different from an election conducted among the plant's full working force. On the other hand, if the Board waited until the plant had hired a full complement of workers, the currently employed workers might have been unfairly deprived of their rights under the Wagner Act. Such was the dilemma in which the Board was placed. It was statutorily enjoined to preserve the principle of majority rule, but still the Board could not fairly deprive the employed workers within an expanding unit of their legal bargaining rights for an unduly protracted period.

To resolve the problem, the Board ruled that it would certify a bargaining agent when 50 per cent or more of the contemplated working force had been hired, or when a "substantial number" of the total staff had been employed.²¹ Accordingly the Board often dismissed certification petitions until it could be shown that the company involved had already employed at least 50 per cent of its expected total personnel staff.²² On the other hand, when it could be shown that a "substantial number" of the prospective labor force had already been employed, the Board certified labor organizations, regardless of whether the number actually working constituted 50 per cent of the expected staff. In one such instance the Board entertained a certification petition even though only 454 workers had been hired of a contemplated staff of 2000.²³ Similarly the N.L.R.B. directed a representation election in another case even though only 1284 workers had been employed of an expected full force of 3195.²⁴ In ordering the election, the Board noted that the workers currently employed, though less than 50 per cent of the prospective staff, constituted a "substantial number" of employees, and declared that it saw "no reason why

²¹ *In the matter of Aluminum Company of America*, 52 N.L.R.B. 1040 (1943).

²² National Labor Relations Board, *Seventh Annual Report* (1942), p. 56.

²³ *In the matter of Westinghouse Electric and Manufacturing Company*, 38 N.L.R.B. 404 (1942).

²⁴ *In the matter of Aluminum Company of America*, *op. cit.*, p. 1044.

they should be deprived at the present time of the benefits of collective bargaining."²⁵

One important qualification, however, was attached to certifications issued when less than 50 per cent of the contemplated staff had been employed. In those cases the Board ruled that it would entertain another representation petition within six months after the original certification.²⁶ Ordinarily the Board will not disturb a certification until one year has elapsed.²⁷ In these instances, however, the N.L.R.B. believed departure from the "one-year rule" was warranted so that the principle of majority rule might be effectuated. On the other hand, where at least 50 per cent of the expected force had been hired, the Board refused to disturb a certification for the customary one-year period.²⁸

In conformance with this policy, the N.L.R.B. refused the request of a labor organization to include a new arms plant, still about four months away from completion, in a bargaining unit.²⁹ Even though the old and new plants were geographically proximate to each other, and were owned by the same employer, the Board rejected the union's petition. The strategy of the labor organization, of course, was to merge both plants into the same unit, with the result of insuring that any employees hired to operate the new plant would be automatically included in the unit bargained for by the union. By blocking the union's tactical move, the Board provided future workers with the opportunity of choosing their own bargaining agent. In another case the N.L.R.B. refused the request of a labor union to include into an existing bargaining unit all future unlicensed personnel hired to operate new ships which the company contemplated obtaining.³⁰ In denying the union's petition the Board declared that "to determine now that the employees of such operations are included in the unit may be to deny them the right to a representative of their own choosing."³¹

It is apparent that the N.L.R.B. was deeply concerned with the preservation of the principle of majority rule within expanding industrial units. As indicated in an earlier discussion,³² however, Congress during World War II limited the power of the Board to implement the principle of majority rule. Under the terms of the Board's wartime appropriation acts³³ the N.L.R.B. could not invalidate a contract executed by a minority labor union which had been in existence ninety days or longer. Thus a cardinal

²⁵ *Ibid.*, p. 1046. ²⁶ *Ibid.*, p. 1047. ²⁷ See pp. 138-139 for an analysis of the "one-year rule."

²⁸ National Labor Relations Board, *Eighth Annual Report* (1943), p. 45.

²⁹ *In the matter of U. S. Cartridge Company*, 42 N.L.R.B. 191 (1942).

³⁰ *In the matter of American Steel and Wire Company*, 63 N.L.R.B. 1244 (1945).

³¹ *Ibid.*, p. 1246. ³² See *supra*, chap. 2.

³³ National Labor Relations Board Appropriation Act, 1946, Title IV, Act of July 3, 1945, chap. 263, Public Law 124, 79th Congress, 1st Session; National Labor Relations Board Appropriation Act, 1945, Title IV, Act of June 28, 1944, chap. 302, Public Law 373, 78th Congress, 2nd Session; National Labor Relations Board Appropriation Act, 1944, Title IV, Act of July 12, 1943, chap. 221, Public Law 135, 78th Congress, 1st Session.

principle of the Wagner Act could have been seriously violated when employers executed contracts with minority unions. Such a situation as noted existed in the *Kaiser Shipbuilding* cases.³⁴

The Disrupted Bargaining Unit

After the termination of the war industry began reconverting to peacetime production. In many instances this switch in production resulted in disturbed industrial conditions. For a period of several months some companies' postwar industrial activities were uncertain. In addition, the change to peacetime pursuits often entailed an inactive period during which plants were retooled and otherwise prepared for civilian production. Under these conditions the size and composition of personnel staffs were frequently rendered indeterminate.

Recognizing this state of confusion, the N.L.R.B. refused to proceed with the determination of bargaining representatives where conversion from war to peacetime industrial operations had disrupted the bargaining unit to the extent of rendering collective bargaining temporarily impracticable.³⁵ This situation arose in one case where a plant was to cease operations within a few weeks after a union had filed a representation petition. In denying the union's certification request, the N.L.R.B. stated that "inasmuch as the plant petitioned for herein is to cease operations permanently within several weeks, and the employees working therein are to lose their identity as a separate unit, we conclude that no useful purpose would be served by directing an election."³⁶ Similarly a labor organization's petition for a representation election was denied when the employees of a plant did not adequately represent the size and composition of the force to be utilized in peacetime operations.³⁷ Neither did the Board permit war production employees temporarily laid off because of reconversion and not skilled in the manufacture of the plant's peacetime products to vote in representation elections.³⁸

On the other hand, the N.L.R.B. refused to sustain the "disruption of production" argument where the contention was advanced to forestall certification of bargaining representatives. In one such case the Board found no reason to postpone a representation election merely because a company reduced its working force after the end of hostilities.³⁹ The N.L.R.B. pointed out that the change in this company's operations "involves no material change in the appropriate unit, but only a reduction in its size."⁴⁰ Similarly the fact that a company contended that it was to cease

³⁴ See *supra*, pp. 31-33. ³⁵ *In the matter of Armour and Company*, 62 N.L.R.B. 1194 (1945).

³⁶ *Ibid.*, p. 1196.

³⁷ *In the matter of Harnischfeger Corporation*, 66 N.L.R.B. 252 (1946).

³⁸ *In the matter of Crosley Corporation*, 66 N.L.R.B. 349 (1946). Permanent employees temporarily laid off are often authorized to vote in representation elections. See *In the matter of National Electric Products Corporation*, 3 N.L.R.B. 475 (1937).

³⁹ *In the matter of Reliable Nut Company*, 63 N.L.R.B. 357 (1945).

⁴⁰ *Ibid.*, p. 360.

operations four months after the representation hearings did not constitute a sufficient basis to preclude a bargaining election.⁴¹ To protect the bargaining rights of employees, the Board ruled in this case that the effects of the termination of the war had to be present at the time of the representation hearings. Mere future contemplation of the effects were not sufficient grounds for postponement of certification proceedings. In other cases employers' predictions of contemplated consequences of re-conversion likewise did not preclude representation elections.⁴² Thus the Board postponed representation proceedings only in those cases in which the termination of the war caused an actual and a material disruption of the bargaining unit.

Classification Problems

Not only must the N.L.R.B. determine whether the unit for collective bargaining shall be designated along craft or industrial lines, but it must also decide in each case which particular employees are to be included within the bargaining unit. Under the terms of the Wagner Act, only agricultural workers, domestic servants, and any individual employed by his parent or spouse are excluded from the provisions of the Act.⁴³ However the Board has refused in some circumstances to include other categories of employees in the bargaining unit. In general, foremen have been excluded from rank-and-file workers' bargaining units.⁴⁴ These employees have been excluded on the grounds that their presence in the unit might interfere with the right of ordinary workers to self-organization and collective bargaining. Similarly the Board frequently has refused to include clerical and other office employees⁴⁵ in production workers' bargaining units on the basis that a sufficient community of interest does not exist between the two classes of employees. In short, groups of workers have been excluded from bargaining units whenever the Board has felt their inclusion would tend to impair the collective bargaining process.⁴⁶

Similar to its peacetime experiences, the Board during the war years was required to decide whether special categories of wartime employees were to be included in bargaining units. One such case involved workers hired after the conversion of industry to wartime production. Some employers contended that these employees should not be included within the bargaining unit because their services would not be required once industry reconverted to peacetime activities. In addition, it was urged that

⁴¹ *In the matter of Edison General Electric Appliance Company*, 63 N.L.R.B. 968 (1945).

⁴² *In the matter of Underwood Machinery Company*, 59 N.L.R.B. 42 (1945); *In the matter of General Bronze Corporation*, 60 N.L.R.B. 1098 (1946).

⁴³ National Labor Relations Act, Sec 2(3).

⁴⁴ Teller, *Labor Disputes and Collective Bargaining*, p. 350.

⁴⁵ *In the matter of Pacific Gas and Electric Company*, 3 N.L.R.B. 835 (1937).

⁴⁶ Other employees excluded at times from bargaining units include doctors, nurses, laboratory workers, watchmen, timekeepers, porters, salesmen, guards, and technical or professional employees. See Teller, *op. cit.*, p. 351.

workers employed during the war period were "temporary employees" and as such had no standing under the terms of the Wagner Act. Rejecting this argument, the Board ruled that new and old workers were equally entitled to the protection of the Act.⁴⁷ A contrary interpretation probably would have deprived millions of wartime employees of the benefits afforded by the National Labor Relations Act.

Despite employer objections, the N.L.R.B. ruled that instructors employed to train groups of new wartime employees were to be included in the same unit as production workers.⁴⁸ In another case a group of instructors hired to train Army and Navy personnel in the operation of war equipment manufactured by a company constituted a unit appropriate for the purposes of collective bargaining. Even though these instructors performed their duties in a camp geographically separated from the rest of the company's plant, the Board found that the employees could properly constitute a bargaining unit.⁴⁹ Notwithstanding another company's desire to have a group of nurses included in a production employees' bargaining unit, the N.L.R.B. classified them into a separate unit on the ground that the nurses constituted a well defined professional group with interests and conditions of work dissimilar from the production workers.⁵⁰

During the war period the N.L.R.B. was also compelled to decide whether plant protection employees and foremen could properly constitute bargaining units. Similar to the problem involving instructors, "temporary" wartime employees, and nurses, the Board found it necessary to ascertain whether guards and supervisors might enlist the protection of the N.L.R.B. while exercising their right to organize and bargain collectively. Could these employees be included in the same unit with production workers? What would be their status under the Wagner Act if they organized labor unions composed only of foremen or plant security workers? These issues as well as others pertaining to supervisors' and plant guards' organizational activities are dealt with in the following two chapters.

⁴⁷ *In the matter of American Rolbal Corporation*, 41 N.L.R.B. 907 (1942).

⁴⁸ *In the matter of General Steel Castings Corporation*, 41 N.L.R.B. 350 (1942).

⁴⁹ *In the matter of Consolidated Aircraft Corporation*, 45 N.L.R.B. 1155 (1942).

⁵⁰ *In the matter of Hudson Motor Car Company*, 45 N.L.R.B. 55 (1942). Under the terms of the Labor-Management Relations Act, 1947, Sec. 9(b)(1), the N.L.R.B. may not decide that any unit is appropriate for purposes of collective bargaining if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit.

FOREMEN UNIONS

Changing Status of Foremen

Technological progress as well as the centralization of the management function have materially changed the foreman's status in the productive process. These factors have tended to divorce foremen from their traditional relationship with top management. Originally foremen were somewhat similar to independent contractors or were at least endowed with great authority over many phases of industrial life, including matters of production and personnel. They were allowed great latitude in the setting of workers' wage rates, in hiring and discharging, and in matters of promotion, demotion, transfer, and discipline. In both personnel problems and in production matters, foremen acted upon their own initiative and ordinarily refrained from seeking the approval of their superiors in the execution of duties. Their judgment was generally accepted in the shaping of major company policies, and little was done without their express approval.¹

Technological improvements resulting in the modern specialized nature of production weakened the foreman's former status. As a result of general economic development, the industrial process became highly departmentalized. Such specialization of production requires a central source of authority to integrate and coordinate all individual functions. Consequently a new layer of officials arose between the foreman and top management. Production managers, plant supervisors, and superintendents of production were endowed with the responsibility of coordinating plant departments, and accordingly were given authority over foremen. In order to meet production requirements, foremen were required to get the work out of their specialized departments in conformance to standards and to time deadlines as established by top authority. Such requirements are, of course, necessary in modern industry, as the final product could scarcely be efficiently produced as long as minor, though vital, processes are delayed or completed incompetently. Consequently, though the foreman's authority over general production matters decreased, he was constantly being held to higher and higher standards of performance. Tolerances were reduced as the industrial process became more and more specialized. All parts of the product were required to reach the final assembly point at a specified time, and, once there, had to fit accurately

¹ "Report and Recommendations of the Panel," *War Labor Reports*, vol. 26, p. 666. A panel headed by Professor Sumner Slichter was established by the National War Labor Board to determine the economic causes of foremen labor organizations and to make recommendations with respect to the problem. The Panel conducted a most thorough analysis of the issues involved, and its report will probably stand as a significant contribution to economic literature.

in relation to the whole. Thus "the routing and scheduling of production in each department so as to obtain the desired over-all coordination necessarily deprives departmental foremen of their independence and authority to run their own departments."²

Accompanying the progress in technological matters was the centralization of the management function. Modern industrial plants employing hundreds and thousands of workers require a common personnel policy for all workers performing operations within a company's various specialized departments. Under these conditions, it becomes impossible for each foreman, for example, to set wage rates inasmuch as this would probably result in as many different wage rates in the modern plant as there were foremen. Likewise the foreman's former authority with respect to hiring, promoting, demoting, assigning work, and administering discipline was also materially weakened. It is necessary for top management to establish central control over all these matters, as well as over others, in order to insure uniformity and avoid worker dissatisfaction. Apart from such centralized control over personnel policies, the growth of trade unions similarly tended to diminish the foreman's authority in personnel matters. Thus the collective bargaining contract ordinarily establishes in detail practically all the terms and conditions of employment. Moreover, foremen, formerly the first, and in most cases the last, source of grievance adjustment became subordinated to the grievance machinery which is typically set forth in the standard labor contract. The supervisor's prestige was further impaired when it became apparent that collective bargaining agreements were customarily executed by top management officials and top labor leaders.³

Development of the modern productive process, centralization of the management function, and the growth of trade unionism all have undermined the foreman's former high degree of authority and independence. Thus a spokesman for top management pointed out that the foreman "was responsible for everything that took place within his department, but, as nearly as we could find out, his range of authority was very limited."⁴ It was further recognized that though the modern foreman can recommend changes in the plant, so can employees through the "suggestion box." As for wage rates, management representatives stated: ". . . we can't allow the foremen to raise wages or set rates of pay . . . otherwise we shall get all out of line with the rest of the plant."⁵ Neither could foremen be allowed to change productive methods, and some management spokesmen concluded by declaring that the foreman's authority is limited, "and it

² *Ibid.*, p. 667. ³ "Who Gets Foremen," *Business Week*, December 16, 1939, p. 37.

⁴ "The Foremen in Labor Relations," *Personnel Series No. 87* (American Management Association), p. 21. ⁵ *Ibid.*, p. 22.

must stay that way." It appears that foremen no longer are makers of company policies, but rather are now executors of predetermined programs. Now he can recommend, where formerly he was empowered to make the decision and issue the final order. As in military life, the modern foreman receives his orders and must forthwith unquestioningly execute them with dispatch, force, and accuracy. "The foreman is more managed than managing, more and more an executor of other men's decisions."⁶ Thus economic forces have tended to separate supervisors from top management, reduce their former degree of authority and independence, and produce a sharply defined employer-employee relationship between high company officials and foremen. As this relationship became more apparent, some foremen, as rank-and-file employees, began to organize in labor unions in order to equalize their bargaining strength with their employers.

Similar to rank-and-file workers, foremen engaged in modern industry developed a specific set of grievances. These grievances were accentuated during the war period. Among the more important were those involving wages, sick pay, establishment of grievance machinery, lack of a clearly stated company personnel policy with respect to foremen, and the lack of support given by higher management to foremen in their dealings with rank-and-file workers and with trade union leaders.⁷ Evidence indicated, however, that insecurity was the most important grievance possessed by foremen. This fear of layoff and demotion was sharply augmented during the war as the number of foremen greatly expanded with the increase of production. "The prospective reduction in the number of supervisors has introduced great insecurity into the lives of all foremen, both old and new. No one knows which supervisors will be kept after the war. The man of long service fears that he may be dropped in favor of younger supervisors with shorter services."⁸ Both the new and old foremen apparently recognized that a cornerstone of trade union policy is the protection of job security. If layoffs and demotions had to come, some foremen realized that adherence to a seniority policy, for example, would introduce a degree of security in their jobs. By organizing, some foremen recognized that they would be able to insist upon some sort of a security program. Moreover, this fear of indiscriminate layoffs and demotions evidently was justified. On this point, a representative of management stated: "... again it appears that the foreman is worried about security — justifiably I think. If you look back to the last depression, you will remember that in a good many concerns foremen were laid-off indiscriminately, without regard to seniority or ability."⁹

⁶ "Report and Recommendations of the Panel," *op. cit.*, p. 669.

⁷ *Ibid.*, p. 646.

⁸ *Ibid.*, p. 673.

⁹ "The Foreman in Labor Relations," *op. cit.*, p. 16. (The statement was made by the Director of Personnel Relations, Jones and Laughlin Steel Corporation.)

In addition to increasing the insecurity factor, war conditions also caused a lag in adjustment of foremen wage rates commensurate with those of the rank-and-file employees. It was pointed out that the ordinary worker was sometimes paid one and one-half to two times more than the basic wage for working overtime or for giving up holidays. He also received an extra differential for night work. As a result of their supervisory status, foremen were usually paid a salary, and performed such extra work without corresponding increases in compensation.¹⁰ Another wartime study concluded that foremen "wages failed to keep pace with increases secured by the production workers through collective bargaining agreements. The discrepancy became apparent during the war when foremen were required to work longer daily hours and on a seven-day week, without as high rate for overtime as paid to the men under their supervision."¹¹ In the light of the war wage stabilization program, such a discrepancy appears understandable. Labor organizations vigorously presented rank-and-file wage issues to the National War Labor Board, and top management attempted to protect the standard of living of the white collar workers, including foremen, by instituting wage increase applications. Nevertheless, foremen "take home pay" proportionately fell behind the "take home pay" of production workers.

As noted, many former ordinary workers were promoted from the ranks during the war to foremen status. While operating as a production worker, the employee probably was a member of a trade union. As such, his conditions of employment were frequently rigidly defined in a collective bargaining agreement. Promoted to foreman, the former rank-and-file employee no longer had his rates of pay, hours, seniority, vacations, sick leave, promotions, demotions, or transfers set forth in a contract.¹² Moreover, grievances over these matters had to be presented by the foreman to top management on an individual basis. It was generally recognized that such a situation could easily lead to discrimination against a supervisor. Individual bargaining affords an employer the opportunity to get rid of the "complainers" and "trouble-makers." Through collective bargaining, the newly promoted foreman as well as the old supervisors recognized that conditions and terms of employment could be rendered more definite and certain, and that grievances would be handled on a collective rather than on an individual basis.

Apparently no legal barrier prevented foremen from organizing into labor organizations. All employees, regardless of their status in the industrial hierarchy, have had the legal right to organize into associations

¹⁰ "Report and Recommendations of the Panel," *op. cit.*, p. 672.

¹¹ *Monthly Labor Review*, February, 1946, vol. 62, p. 241.

¹² "Report and Recommendations of the Panel," *op. cit.*, p. 673.

for the purpose of collective bargaining for over a century.¹³ However, labor history has demonstrated that this right could be impaired when some hostile employers interfered with the development of rank-and-file organizations.¹⁴ Accordingly foremen had reason to believe that employers would similarly resist the development of their labor organizations. Under these circumstances it was expected that supervisors would seek the support of the National Labor Relations Board to protect them in their organizational activities. As the Board had prevented employers from interfering with the growth and activities of rank-and-file unions, foremen hoped that the Board would extend the same protection to their labor organizations. Obviously, foremen unions could further their organizational efforts by striking, for example, to prevent employers from discriminating against their members. In addition, foremen could strike to force employers to recognize their unions. They could also strike to compel top management to bargain collectively with their representatives. However, the National Labor Relations Board offered a peaceful and legal method whereby all these aims could be realized. Moreover, in the light of labor's wartime no-strike pledge, it could be expected that foremen, during the war period, would be even more anxious to realize their desire for collective bargaining by utilizing the Board's machinery. If the N.L.R.B. granted foremen full legal protection in their organizational activities, there would be no need for organizational strikes. To what extent then did the National Labor Relations Board extend to foremen the protection afforded by the Wagner Act?

Traditional Foremen Unions

Membership of foremen in labor organizations in some industries has long been a common practice. Specifically, nine old established unions are composed solely of persons of supervisory rank. Three constitute organizations of licensed maritime personnel, two include yardmasters and supervisors in the railroad industry, one is composed of master mechanics and foremen in Navy yards, and three include supervisory personnel in the Postal and Railway Mail Service.¹⁵ In the printing trade industry, membership of foremen in rank-and-file unions, as differentiated from those organizations composed only of supervisors, has been permitted or required ever since 1889. Apparently this practice in the printing industry is well established and is accepted by management and labor as a "matter of course."¹⁶ On the other hand, there are generally two types of unions in the maritime industry, one for the officers and another for

¹³ Ever since *Commonwealth of Massachusetts v. Hunt*, Massachusetts, 4 Metcalf III (1842), trade unions in themselves were declared legal.

¹⁴ See pp. 9-10, where this problem receives additional attention.

¹⁵ United States Bureau of Labor Statistics, *Bulletin 745, Union Membership and Collective Bargaining by Foremen*, p. 2. ¹⁶ *Ibid.*, p. 3.

unlicensed seamen.¹⁷ In the building trades and in some metal trades industries, foremen are generally included in rank-and-file unions. Similarly, the inclusion of supervisory workers in ordinary unions has increased in British trade unions.¹⁸

These traditional foremen unions have consistently received the full measure of the protection afforded by the Wagner Act. In an early case, the N.L.R.B. found that licensed deck officers constituted a unit appropriate for collective bargaining despite their superior position with respect to the ordinary seamen. Recognizing the difference of rank, the Board, however, placed the officers in a separate bargaining unit.¹⁹ Similarly, on another occasion, the N.L.R.B. classified a group of maritime officers, including masters and licensed engineers, as a proper unit for bargaining purposes.²⁰ Protection of the Wagner Act was also extended to foremen who desired to join rank-and-file labor organizations in the printing industry. In rendering a decision in a printing trade case, the N.L.R.B. declared that it had "in the past adopted the general policy of including in the appropriate unit minor supervisory employees where they are members of or eligible for membership in the claiming union, and the union, without opposition of a rival union, wishes them included."²¹ Though the problem was not squarely met, the N.L.R.B., in a 1941 case, apparently extended the principles of the Wagner Act, not only to foremen organizing in those industries in which they have traditionally formed labor unions, but also to supervisors employed throughout industry. This case involved the organizational activities of shift operating engineers employed at three powerhouses of a company. Evidence proved that their duties consisted of looking after machine operations, cleaning machines, making reports, and supervising, to a certain extent, work of firemen and repairmen. Notwithstanding the fact that the shift operating engineers had the authority to recommend discharges, promotions, or demotions of firemen, the N.L.R.B. ruled that the supervising employees constituted an appropriate unit for collective bargaining within the meaning of the Wagner Act.²² The new issue, joined squarely for the first time during World War II, was the extent to which the Board would extend the protection of the Wagner Act to foremen employed throughout industry.

Unlawful Discrimination Against Foremen

A survey of the Board's rulings indicates that it did protect foremen engaged in general industry from discharge caused by their union activi-

¹⁷ *Ibid.*, p. 4. ¹⁸ *Ibid.*, p. 5.

¹⁹ *In the matter of International Mercantile Marine Company*, 1 N.L.R.B. 384 (1936).

²⁰ *In the matter of Bull Steamship Company*, 36 N.L.R.B. 99 (1941).

²¹ *In the matter of the Brooklyn Daily Eagle*, 13 N.L.R.B. (1939), 974, 984.

²² *In the matter of General Motors Corporation*, 36 N.L.R.B. 439 (1941).

ties. One typical case involved a construction superintendent of a mining company who had joined a rank-and-file labor organization.²³ After repeated warnings to sever his membership from the union, the foreman was discharged. But inasmuch as the N.L.R.B. considered the supervisor an "employee" within the terms of the Wagner Act, the employer was directed to reinstate the foreman. On this point the N.L.R.B. stated that "it does not lie with the employer to advise his employees who happen to be foremen that they may not join unions or to discharge them if they do."²⁴ When a foreman was discharged because he refused to engage in strike-breaking activities, as ordered by his employer, because of sympathy for the workers on strike, the N.L.R.B. also ordered his reinstatement.²⁵ In directing the foreman's reinstatement, the N.L.R.B. declared that it had often "held foremen to be supervisory employees, whose interest lies with the management and for whose acts the employers are responsible. However, it is also true that foremen frequently do join labor organizations and that in many respects their interests lie with the employees as well as with their employers. The Act does not exclude foremen from its protection,²⁶ but instead applies, by virtue of its own wording, to employees generally, i.e., to 'any employee.'"²⁷ In short, the Board took the position that all foremen not being specifically excluded from the terms of the Wagner Act were "employees" within the meaning of the law, for at least protection against discriminatory discharge.²⁸

On this point, in 1940, a federal court agreed with the N.L.R.B. that in some instances a foreman could properly be considered an employee under the terms of the Wagner Act. It upheld a Board's order directing an employer to reinstate a supervisor discharged for union activities. Rejecting the company's contention that a foreman was an "employer" within the meaning of the National Labor Relations Act, the court stated that "a foreman, in his relation to his employer, is an employee, while in his relation to the laborers under him he is the representative of the employer and within the definition of Sec. 2(2) of the Act."²⁹ The court's

²³ Bear in mind that rank and file unions generally do not permit foremen in their membership. Notable exceptions to this rule, as demonstrated, include the printing trade unions, building and metal trades, and some maritime unions.

²⁴ *In the matter of Golden Turkey Mining Company*, 34 N.L.R.B. (1941), 760, 779.

²⁵ *In the matter of the Hazel-Atlas Glass Company*, 34 N.L.R.B. 346 (1941).

²⁶ National Labor Relations Act, 49 Stat. 449, Sec. 2(3) defined "employee" for purposes of the Wagner Act as "any employee" engaged in interstate commerce except (1) any individual employed by his parent or spouse (2) any person employed in the domestic service of any family or person at his home (3) any individual employed as an agricultural laborer. [Author's footnote.]

²⁷ *In the matter of the Hazel-Atlas Glass Company*, *op. cit.*, p. 415.

²⁸ See, however, *In the matter of Sherwin Williams Company*, 37 N.L.R.B. 260 (1941), in which an employer lawfully disciplined a foreman because he refused to give up his union membership, when the foreman was actively urging rank-and-file employees to join a union. Here, of course, the employer was protecting himself from a violation of the Act, as employers are responsible for the conduct of their foremen.

²⁹ *N.L.R.B. v. Skinner & Kennedy Stationery Company*, 113 Fed. (2d) 667, 671 (CCA-8, 1940).

clear-cut presentation of the dual nature of foremen became of even greater significance when the N.L.R.B. was subsequently required to decide whether all foremen are "employees" under the Wagner Act for purposes of collective bargaining.

Thus far the N.L.R.B. has held that a supervisor is an "employee" for purposes of collective bargaining in those industries where foremen traditionally have organized. For example, the Board would compel an employer to bargain collectively with a union composed of deck officers even though the officers stand in a superior relationship to the ordinary seamen. Similarly, the Board applied the protective features of the Wagner Act to foremen, regardless of the industry in which they were employed, when they had been discharged discriminatorily. In these two respects the N.L.R.B. treated supervisors and rank-and-file employees alike. Only one more major question remained unanswered: would the N.L.R.B. extend the protection of the Wagner Act into industries in which foremen had not traditionally organized and bargained collectively? Specifically, would the Board direct employers to bargain collectively with foremen unions whose members were engaged, for example, in the coal, steel, and automobile industries?

The Union Collieries Doctrine

When fifty-eight minor supervisors engaged in coal mining organized a union in order to bargain collectively, the employer involved refused to recognize their union or bargain collectively with their representatives. The foremen had formed an independent union, called the Mine Officials Union of America, in the hope of equalizing the bargaining relationship between them and top management. But the mine operators refused to deal with the union until it was certified by the N.L.R.B.³⁰ After conducting a hearing at which representatives of the union concerned, officials of the Congress of Industrial Organizations and the American Federation of Labor, and spokesmen for employer groups testified, the National Labor Relations Board, in a divided opinion,³¹ rendered one of its most important wartime decisions. It ruled that assistant supervisors and other minor foremen constituted a unit appropriate for the purpose of collective bargaining and could properly bargain as a separate unit under the protection of the Wagner Act.³² When certified by the N.L.R.B., the union involved would constitute a statutory bargaining agent and the employer would be required by law to recognize the organization and to bargain collectively with its agents. It is to be emphasized that the union

³⁰ "Supervisors' Unions and the Wagner Act," *Labor Relations Reporter*, March 30, 1942, vol. 10, p. 147.

³¹ Millis, Chairman of the N.L.R.B., and Leiserson constituted the majority; Reilly dissented.

³² *In the matter of Union Collieries Coal Company*, 41 N.L.R.B. 961 (June 15, 1942).

was composed solely of foremen; it had no affiliation with any rank-and-file labor union; and it included as members only minor supervisors. In describing the work of the foremen, the N.L.R.B. minimized their importance in this company by stating that "none participates in determining the policy of the company or has power to hire or discharge. They have slight disciplinary power over employees under their supervision and in some cases no disciplinary power."³³ Although the Board included assistant foremen, fire bosses, weigh bosses, and coal inspectors in the unit, it excluded night bosses because they exercised major functions, including supervisory duties over the foremen in the established unit.

In the *Union Collieries* case, the Board held that the protective features of the Wagner Act were to be extended to foremen throughout industry. To support its decision the Board pointed to the broad definition of "employee" as contained in the National Labor Relations Act.³⁴ Accordingly, the N.L.R.B. ruled that the supervising personnel in the instant case were "employees" within the meaning of the law, and stated that to debate their employee status for the purpose of collective bargaining would be a "barren academic exercise."³⁵ In conformance with the Board's decision, the mine foremen could form a labor organization, petition for a certification, and bargain collectively under the protection of the Wagner Act. Thus the Board considerably broadened the scope of the National Labor Relations Act. It was prepared not only to protect all foremen from discriminatory discharge and to give legal protection to the collective bargaining rights of foremen employed in the printing trades or maritime industries, but was willing to apply the provisions of the Wagner Act to support the collective bargaining rights of at least minor supervisors employed throughout industry.

Board Member Reilly, however, sharply differed with the majority's decision. He contended that despite the broad definition of the word "employee" as embodied in the Wagner Act, the N.L.R.B. could not properly interpret the term so as to afford statutory protection to foremen labor unions. According to his view, such an interpretation could lead to *reductio ad absurdum* in which the term "employee" would include presidents and vice-presidents. He also believed that organized foremen could not serve their employers with wholehearted loyalty because, as union members, supervisors would tend to place the interests of their subordinates above those of top management. Reilly's contention was also supported by the United States Chamber of Commerce, whose spokesman stated that "foremen should not be separated from management through membership in unions, which leads inevitably to conflicting loyalties on the

³³ *Ibid.*, p. 967.

³⁴ See *supra*, n. 26.

³⁵ *In the matter of Union Collieries Coal Company*, 44 N.L.R.B. 165; Supplemental Decision and Certification of Representatives, September 18, 1942.

part of foremen."³⁶ This argument appears to be directed against foremen unions in general and is not confined to the question of whether collective bargaining by supervisors should be protected under the terms of the Wagner Act. As pointed out, foremen similar to all employees have the legal right to organize and bargain collectively independent of the National Labor Relations Act. If the organization of foremen actually results in divided loyalty, and if this is deemed socially undesirable, it appears that the proper remedy would be to outlaw all foremen unions. This, of course, would necessitate a most fundamental change in national labor law. In view of these considerations, one might question whether Reilly clearly understood the implications of his "loyalty" argument. Moreover, he expressed the fear that if the same parent union³⁷ represented both foremen and ordinary workers, union pressure would be exerted on the foremen with the result of divorcing them from "their single minded allegiance to management." Finally, he objected to the majority opinion because he believed that organized foremen would coerce rank-and-file employees into joining or not joining labor organizations. This coercion would lead to unfair labor practice charges being filed against employers as they still would be responsible for the acts of their supervisors. On this score, Reilly apparently ignored the fact that an employer can properly take all steps necessary to insure that his foremen remain neutral with respect to the organizational activities of the rank-and-file workers.³⁸ It appears that Reilly avoided the basic question in the case — the issue of whether foremen engaged in general mass production industry are employees under the terms of the Wagner Act for purposes of collective bargaining.

Extension of the Union Collieries Doctrine

Proceeding from the premise that all supervisors are employees within the meaning of the National Labor Relations Act, and accordingly enjoy substantially the same rights with respect to the choice of bargaining representatives as do ordinary workers, the N.L.R.B. subsequently permitted the same parent union to bargain for both foremen and rank-and-file employees. However, the Board did require that the two categories of employees be classified in separate bargaining units. In one typical case, the N.L.R.B. ruled that a group of ticket agents and dispatchers of a bus company constituted an appropriate unit for the purposes of collective

³⁶ "Labor Policies of Chamber of Commerce," *Labor Relations Reporter*, July 30, 1945, vol. 16, p. 754.

³⁷ Of course, this argument was not pertinent in the *Union Collieries* case because the foremen's union was independent of any rank-and-file union.

³⁸ See *supra*, *In the matter of Sherwin-Williams Company*. Reilly was a member of the Board when the N.L.R.B. supported an employer who disciplined a foreman when he actively urged ordinary employees to join a particular union. See pp. 198-201 for an additional treatment of this problem.

bargaining even though the same parent union represented both the ordinary bus drivers and the ticket agents and bus dispatchers. Evidence introduced in the hearings revealed that the company's bus drivers were subordinated in some respects to the bus dispatchers. In rejecting the employer's contention that this policy was inconsistent with the provisions of the Wagner Act, the Board held that these supervisory employees may designate as their representatives for collective bargaining the same union which represents employees under their supervision.³⁹

Similarly, in a matter involving foremen who exercised authority over production workers, the N.L.R.B. ruled that nothing in the law precluded the supervisors from choosing the same parent union which represented the production employees.⁴⁰ As noted, foremen were ordinarily classified in a bargaining unit separate and distinct from the rank-and-file unit. However, beyond this one qualification, the Board found no reason to limit otherwise foremen bargaining activities. An analysis of Board rulings indicates that workers' desires have always been an important factor weighed by the N.L.R.B. in the determination of the bargaining unit.⁴¹ Consequently, the National Labor Relations Board to reach a decision in line with its established policy was apparently required to afford foremen full freedom in the selection of bargaining agents. Under the terms of the Wagner Act, the choice of a bargaining agent is a right which belongs exclusively to employees. Therefore, the N.L.R.B. appears to have little choice but to certify any legitimate labor organization selected by workers. As long as foremen are considered employees for Wagner Act purposes, it would seem that they have the statutory right to choose whatever agents they desire. Aware of these considerations, the N.L.R.B., in a later case, further ruled that the same local union could represent both production and supervisory employees.⁴²

While classifying foremen as employees for the purposes of collective bargaining, the Board, subsequent to the *Union Collieries* case, refused to include in the same bargaining unit supervisors of different levels. In one case, a foremen's union petitioned the N.L.R.B. to classify in one unit general foremen, foremen, and assistant foremen.⁴³ The N.L.R.B. rejected this request because it pointed out that the general foremen exerted a substantial degree of supervision over the foremen and assistant foremen and that assistant foremen were subject to the authority of the foremen. Specifically, the general foremen had the

³⁹ *In the matter of the Harmony Short Line Motor Transportation Company*, 42 N.L.R.B. 757 (1942).

⁴⁰ *In the matter of the Godchaux Sugar Company, Inc.*, 44 N.L.R.B. 874 (1942).

⁴¹ See National Labor Relations Board, *Second Annual Report* (1937), p. 127 where the Board stated that it "has given great weight to the desires of the employees themselves"

⁴² *In the matter of Cramp Shipbuilding Company*, 46 N.L.R.B. 115 (1942).

⁴³ See *In the matter of Boeing Plane Company*, 45 N.L.R.B. 630 (1942).

power to discharge foremen and to alter their wage rates, and the foremen exercised similar control over the assistant supervisors. In view of these considerations, the N.L.R.B. believed that the organizational rights of the lower supervisors might be interfered with by the higher category of foremen. The Board probably envisaged the possibility of the higher foremen coercing lower supervisors to join labor organizations as a condition of employment. Similarly, the N.L.R.B. refused to include in one unit moving picture theatre managers, assistant managers, utility workers, treasurers, and ordinary workers because the theatre managers had the authority to hire and fire the non-supervisory employees and exerted similar indirect authority over the assistant managers and utility employees.⁴⁴ Neither would the N.L.R.B. classify into one unit both foremen and production workers employed by an automobile manufacturing company, despite the request of a petitioning union.⁴⁵

By the spring of 1943 the N.L.R.B., except for the above noted limitations, had extended the protection of the National Labor Relations Act to the organizational and collective bargaining activities of foremen employed in general mass production industry. Not only could supervisors, classified in a unit separate from that of production workers, choose independent unions to represent them, but, in addition, they could select national or local organizations which bargained for ordinary employees. On the other hand, the Board refused to classify into one bargaining unit foremen and rank-and-file employees, or foremen of unlike levels of authority.

Reversal of Policy — The Maryland Drydock Decision

Perhaps no further elaborate exploration of the National Labor Relations Board relationship to foremen unions would be necessary had there not been a change of personnel on the Board. Subsequent to the *Union Collieries* case, John M. Houston replaced William M. Leiserson as a member of this three-man tribunal. Shortly after the shift occurred, the N.L.R.B. on April 6, 1943, held another hearing on the foremen union problem. During the course of the proceedings, it became apparent that Houston would refuse to sustain the policy established in the *Union Collieries* case. The following questions asked by the new member indicated his attitude:

QUESTION: "Could there be undivided loyalty to management by supervisors if they were organized?"

ANSWER: (By the counsel of a corporation involved in a foremen union representation case pending before the Board) "No . . . especially where as claimed in this case the supervisors were organized with the support and assistance of the

⁴⁴ *In the matter of the Stanley Company of America*, 45 N.L.R.B. 625 (1942).

⁴⁵ *In the matter of Studebaker Corporation*, 46 N.L.R.B. 1315 (1943).

union of production employees in the plant. A supervisor could not effectively discipline production employees who had aided the supervisors' union."

QUESTION: "If the supervisors were organized in an independent union, would there be anything to prevent their affiliation with a national union?"

ANSWER: "No."

QUESTION: "And it could be . . . that the national union with which the foremen affiliated was a rival of the union of production workers?"

ANSWER: "Yes, and it wouldn't be human nature if the foremen did not attempt to influence the production workers to change their affiliation."⁴⁶

Like Reilly, the new member was apparently deeply concerned with the possible effect of the unionization of foremen on the organization of industry. He evidently attempted to inquire into the general desirability of foremen unions from the viewpoint of top management. But the new member, at this time, apparently was not particularly interested in whether foremen were "employees" within the meaning of the Wagner Act for the purposes of collective bargaining. Probably for the benefit of Houston, Millis pointed out that foremen, like ordinary employees, had the legal right to organize and to bargain collectively and that denial to them of National Labor Relations Act protection would not bar supervisors from organizing and seeking to bargain as a group. A representative of a foremen's union also proclaimed that supervisors were going to organize with or without legal assistance and that if the Board refused to afford them the peaceful Wagner Act remedies, they would be compelled "to fight it out." Nonetheless, Houston evidently gave little attention to the basic issue in the controversy — whether foremen engaged throughout industry are employees within the meaning of the National Labor Relations Act for the purpose of collective bargaining.

In the light of the new member's attitude, it was to be expected that the National Labor Relations Board would reverse the policy established in the *Union Collieries* case. With the Chairman of the Board dissenting, Reilly and the new member, Houston, refused to extend the protection of the Wagner Act to foremen in the exercise of their collective bargaining rights.⁴⁷ Specifically, the majority of the Board ruled that a group of supervisors employed by a shipbuilding company did not constitute a unit appropriate for collective bargaining. Consequently this union could not hope to be certified by the N.L.R.B., and in the event that an employer refused to bargain with its representatives, the labor organization could not appeal to the N.L.R.B. for an order which would direct the company to bargain collectively. Despite the fact that the N.L.R.B. had ruled before the *Union Collieries* case that foremen employed in the printing or maritime industries were employees for the purposes of collective bargaining, and that all foremen, regardless of industry, were pro-

⁴⁶ See "N.L.R.B. Reconsiders Foremen's Status," *Labor Relations Reporter*, April 12, 1943, vol. 12, p. 202.

⁴⁷ *In the matter of Maryland Drydock Company*, 49 N.L.R.B. 733 (May 11, 1943).

ted by the Wagner Act with respect to discriminatory discharge, the majority of the Board was not convinced that units of foremen throughout industry "must be recognized by the Board as being appropriate for collective bargaining."⁴⁸ Notwithstanding the fact that Congress did not exclude foremen from the protective features of the law, the majority members of the National Labor Relations Board refused to extend them legal protection of their bargaining rights. Similar to Reilly's dissenting opinion in the *Union Collieries* case, the N.L.R.B. in the instant case refused to interpret the term "employees" so as to include foremen because they believed such a construction might eventually compel the Board to hold that "the highest corporate officials, including even presidents and general managers, were entitled to be included in appropriate collective bargaining units."⁴⁹ Other reasons which the majority presented to support the *Maryland Drydock* decision included the arguments used by Reilly in his dissenting opinion in the *Union Collieries* case.⁵⁰ Again Reilly and Houston were greatly disturbed as to whether foremen unions might not "disrupt established managerial and production techniques."⁵¹

Millis vigorously dissented from the majority's opinion. He pointed out that it was logically inconsistent to consider foremen as employees in some respects, but to refuse to regard them as employees for collective bargaining purposes. Criticizing the majority for enacting administrative legislation, he stated that the Board had no right "to engraft upon the Act an amendment which denies to a substantial segment of employees as a class the protection vouchsafed therein to all 'employees'."⁵² Millis explained for the benefit of his colleagues that the organization of foremen need not disrupt "established managerial and production techniques" if employers instituted appropriate measures to discipline its supervisory and production employees. To aid employers in this respect, the Board could refuse to certify a foremen's union which failed to take proper steps to insure preservation of the line of "demarkation between bargaining units" of supervisors and ordinary employees.⁵³

According to Millis, the majority members of the Board did not recognize the dual nature of the foreman. Such a distinction, as noted earlier, was pointed out by a federal court which held that in relation to the employees subordinated to him, the supervisor acted as a representative of the company, but in his relationship to the employer, the foreman is an employee.⁵⁴ As such, foremen, like ordinary employees, developed grievances and problems.⁵⁵ Finally, Millis warned his associates that denied the protection of the law to foremen's labor organizations, super-

⁴⁸ *Ibid.*, p. 738.

⁴⁹ *Ibid.*

⁵⁰ See *supra*, pp. 174-175.

⁵¹ *In the matter of Maryland Drydock Company*, p. 741.

⁵² *Ibid.*, p. 743.

⁵³ *Ibid.*, p. 744.

⁵⁴ *Supra*, N.L.R.B. v. *Skinner & Kennedy Stationery Company*.

⁵⁵ See pp. 168-169, where the nature of foremen's grievances are discussed.

visory employees may be compelled to resort to their major economic weapon, the strike, to implement organization and collective bargaining. Such organizational strikes appear unnecessary because, as Millis declared, a fundamental objective of the Wagner Act is to eliminate strikes caused by the denial by employers of the right of employees to organize and bargain collectively. Confronted with pressing economic problems, some foremen believed that their difficulties could be adjusted satisfactorily only through the collective bargaining process. Obviously, their problems would not disappear merely because the N.L.R.B. refused to grant foremen unions the protection of the Wagner Act. That, said Millis, "is a policy of negation."⁵⁶ Foremen, he warned, were going to organize and bargain collectively to settle their grievances with or without the protection of the National Labor Relations Act.

Clearly, the *Maryland Drydock* decision did not outlaw foremen unions. Supervisors could still join any union they desired. Provided a rank-and-file union would have them, foremen were even free to belong to labor organizations embracing ordinary workers in their memberships. Neither did the decision forbid an employer to bargain collectively with the representatives of a foremen's union. Moreover, an employer, as before, could still execute a labor contract with a foremen's labor organization. On the other hand, the decision did mean that the National Labor Relations Board would not certify labor unions composed of foremen employed in general mass production industry. Thus these labor organizations could not seek the remedies of the Wagner Act if they were confronted with employers who refused to bargain collectively.

Effects of the Maryland Drydock Doctrine

Although in the *Maryland Drydock* case, the same parent union sought to bargain for both supervisors and production employees, the N.L.R.B., in a later case, also refused to entertain a representation petition from a foremen's union which was separate and distinct from any rank-and-file labor organization.⁵⁷ In declining to differentiate the instant case from the *Maryland Drydock* doctrine, the Board ruled that it was "not persuaded that the factors militating against the establishment of units of supervisory employees, set forth in our decision in the *Maryland Drydock* case, are obviated by the circumstance that the union seeking to represent such employees is an independent, unaffiliated union."⁵⁸ Millis again dissented emphasizing the fact that Reilly and Houston were mistaken in denying the protection of the Act in every case to foremen's unions. Under some circumstances, according to the former Board Chair-

⁵⁶ *In the matter of Maryland Drydock Company*, p. 749.

⁵⁷ *In the matter of General Motors Corporation*, 51 N. L. R. B. 457 (1945).

⁵⁸ *Ibid.*, p. 460.

man, it may be altogether proper to deny certification to foremen unions, but he vigorously opposed the rigid Board majority rule that foremen engaged in general mass production industry under no conditions could constitute appropriate bargaining units. In a later case the N.L.R.B. also found inappropriate separate bargaining units containing respectively general foremen, foremen, and assistant foremen.⁵⁹

Not only did the National Labor Relations Board refuse to accept current foremen representation petitions, but some supervisors' unions, previously certified, were actually decertified. One typical case involved a certified foremen's union which represented a group of supervisors in the shipbuilding industry. Rejecting the protests of the union, the N.L.R.B., upon a motion of the employer, decertified the foremen's union.⁶⁰ Millis in this case agreed that the Board has the power to decertify labor organizations. He also concurred in the finding that the union's certification should be revoked, inasmuch as the union did not "make proper provisions for the organizational autonomy" of the foremen's unit as against the rank-and-file unit.⁶¹ Similarly, the N.L.R.B.⁶² amended a certification issued to a union more than four years previous when the employer argued that the Board should exclude from the unit a group of supervisory employees. Heretofore, a rank-and-file union included in its membership ordinary employees and some foremen. Accordingly the Board amended the union's certification to exclude the supervisory employees.⁶³

Despite the *Maryland Drydock* decision, the N.L.R.B. continued to find units composed of maritime supervisory workers as appropriate for the purpose of collective bargaining.⁶⁴ Similarly the Board declared that the policy established in the *Maryland Drydock* case did not apply to foremen employed in the printing trades industry, stating that the *Maryland Drydock* decision "was not intended to disturb the collective bargaining rights which have been traditionally exercised by foremen in the printing trades."⁶⁵ Neither were inspectors regarded as foremen, even though they possessed authority to reject work. Consequently, a unit composed of such inspectors was regarded as appropriate for the purpose of collective bargaining.⁶⁶ In addition, timekeepers,⁶⁷ plant clerks,⁶⁸ and plant protec-

⁵⁹ *In the matter of Boeing Plane Company*, 51 N.L.R.B. 67 (1943).

⁶⁰ *In the matter of Cramp Shipbuilding Company*, 52 N.L.R.B. 309 (1943). Supplemental Decision and Order revoking certification of representatives. ⁶¹ *Ibid.*, p. 312.

⁶² Millis took no part in the consideration of this case.

⁶³ *In the matter of Shell Petroleum Corporation*, 52 N.L.R.B. 313, Third Supplemental Decision and Amendment to Certification (1943).

⁶⁴ *In the matter of Jones and Laughlin Steel Corporation*, 54 N.L.R.B. 679 (1944). See also *In the matter of Midland Steamship Line*, 53 N.L.R.B. 727 (1943).

⁶⁵ *In the matter of W. F. Hall Printing Company*, 51 N.L.R.B. (1943), 640, 644. See also *In the matter of Union Bag & Paper Corporation*, 52 N.L.R.B. 591 (1943).

⁶⁶ *In the matter of Consolidated Vultee Aircraft Corporation*, 55 N.L.R.B. 577 (1944). See also *In the matter of Industrial Rayon Corporation*, 56 N.L.R.B. 1679 (1944); and *In the matter of United Wall Paper Factories, Inc.*, 49 N.L.R.B. 1423 (1943).

⁶⁷ *In the matter of Todd Shipyards*, 51 N.L.R.B. 1211 (1943).

⁶⁸ *In the matter of Armour and Company*, 49 N.L.R.B. 688 (1943).

tion employees⁶⁹ were not classified as foremen and were permitted to seek Wagner Act protection.

State Labor Relations Board Rulings in Foremen Cases

As early as 1941, the Massachusetts Labor Relations Commission, administering the state's Labor Relations Act⁷⁰ found a group of "division heads" a proper unit for collective bargaining under the terms of the state law. Though the division heads, like foremen, exercised supervision over rank-and-file employees, the Commission found no reason to exclude them from the protective features of the state's Act. In rejecting the arguments of the employer, the state agency declared that "there is no merit in the contention of the employer that the group of division heads do not constitute a proper group for the purposes of collective bargaining . . . as there is no class which should be arbitrarily excluded from representation by the Commission under the Law."⁷¹ As the Act's definition of "employee" was interpreted to include foremen, the State Commission refused to deny the division heads the protection of the law in the exercise of their collective bargaining rights. However, the foremen were placed in a separate unit from the one which included rank-and-file employees. It is noteworthy that the Commission utilized the same arguments advanced by the N.L.R.B. in the *Union Collieries* case, even though the state agency rendered its ruling about twelve months before the National Board decided its case.

Despite the doctrine established by the N.L.R.B. in the *Maryland Drydock* case, the New York State Labor Relations Board refused to follow the National Board's judgment. The State Board ruled that although foremen may act for employers in their relationship to rank-and-file workers, they nonetheless may be regarded as employees under the terms of the state's law. Significantly, the S.L.R.B. utilized the same arguments propounded by Millis. Thus the New York agency contended that it had no authority to refuse foremen the protection of the law as the state legislature did not specifically exclude them from the Act's terms.⁷² In another case, a group of foremen were employed by a firm engaged in interstate commerce. Desiring legal protection in their collective bargaining activities, the foremen's union filed a representation petition with the State Board and not with the National Labor Relations Board. In view of the National Board's ruling in the *Maryland Drydock* case, the foremen's union, of course, realized that it could expect no aid from the

⁶⁹ *In the matter of Aluminum Company of America*, 50 N.L.R.B. 233 (1943).

⁷⁰ See p. 19.

⁷¹ *In the matter of Sears Roebuck and Company*, Massachusetts Labor Relations Commission, Case No. CR 517 (1941).

⁷² *In the matter of Bee Line, Inc.*, New York State Labor Relations Board, Case No. SE 9653 (1943).

N.L.R.B. Consequently it requested certification by the New York Board.⁷³ In assuming jurisdiction of the case, the State Board ruled there was no conflict of authority between the national agency and itself because no petition was previously filed with the N.L.R.B. The State Board, refusing to be bound by the N.L.R.B. decision in the *Maryland Drydock* case, forthwith entertained a certification petition from the foremen's union.⁷⁴ Neither did the New York Board refuse to certify a foremen's union even though it was affiliated with a parent union which represented rank-and-file employees.⁷⁵ The foremen's union policy of the New York Board is particularly noteworthy because Paul Herzog, Chairman of the New York State Labor Relations Board, later replaced Millis as Chairman of the National Labor Relations Board.

Contrary to the Massachusetts and New York State Labor Relations Boards, the Pennsylvania State Labor Relations Board refused to certify a labor organization composed of supervisory employees. When the Pennsylvania Court of Common Pleas reviewed the case, the Court found that the State Board's decision was not "unreasonable, arbitrary, or illegal."⁷⁶ In this connection it might be pointed out that it is extremely doubtful whether any labor organization could have appealed the *Maryland Drydock* decision to the United States Supreme Court. Generally, the designation of bargaining units by the N.L.R.B. is binding upon the courts.⁷⁷ In addition, a labor organization apparently has no standing in court to request a writ which would compel the N.L.R.B. to issue a complaint against an employer.⁷⁸ Thus a foremen's union evidently cannot successfully petition a federal court for a decree which would direct the N.L.R.B. to certify such a labor organization, nor obtain a court order which would compel the Board to issue a directive requiring an employer to bargain with a supervisor's labor union.

⁷³ *In the matter of Allegheny Ludlum Steel Corporation*, New York State Labor Relations Board, Case No. WE 373 (1944).

⁷⁴ The State Board's position was upheld by a New York Supreme Court (Chautauqua County). *Allegheny-Ludlum Steel Corporation v. Kelley*, 49 N.Y.S. (2d) 762 (1944). The Labor-Management Relations Act, 1947, which exempts supervisors from its terms, forbids such a decision. Sec. 14(a) provides that no employer subject to the national law shall be compelled to deem individuals defined as supervisors in the national law as employees for the purpose of any state law relating to collective bargaining. Thus a state law cannot be used to provide foremen with legal protection in their collective bargaining activities where their employer is engaged in interstate commerce. Had the Labor-Management Relations Act been in effect in 1944, the New York court could not have handed down its decision in the *Allegheny-Ludlum* case. See *infra*, pp 195-196 for additional information dealing with foremen under the Labor-Management Relations Act, 1947.

⁷⁵ *In the matter of the Goldsmith and Perlman Company*, New York State Labor Relations Board, Case No. SE 10300 (1944). Compare *supra*, *In the matter of Godchaux Sugar Company* in which the N.L.R.B. originally established the same rule.

⁷⁶ *Division 1327 of the Amalgamated Association of Street Electric Railway & Motor Coach Employees of America v. Pennsylvania Labor Relations Board*, Case No. 2053, Pennsylvania Court of Common Pleas.

⁷⁷ See *Pittsburgh Plate Glass Company v. N.L.R.B.*, 313 U.S. 146 (1941).

⁷⁸ *Marine Engineers' Beneficial Association v. N.L.R.B.*, Docket No. 357, U.S. Supreme Court. Petition for writ of certiorari to the Circuit Court of Appeals denied October 25, 1943.

The National War Labor Board Policy

As noted, the National War Labor Board, created to settle disputes which threatened to interrupt war production, was forbidden to render any decision which was inconsistent with the terms of the Wagner Act as administered by the National Labor Relations Board.⁷⁹ Nevertheless, some foremen, in an attempt to avoid the consequences of the *Maryland Drydock* decision, hoped to utilize the N.W.L.B. as a forum in which they could seek legal protection of their collective bargaining rights. Consequently, on January 6, 1944, a public hearing was held by the N.W.L.B. for the purpose of determining the extent to which foremen disputes would be considered by that agency. During the course of the proceedings representatives of foremen labor organizations urged the N.W.L.B. to ignore the *Maryland Drydock* decision and to direct employers to recognize and to bargain collectively with foremen's unions.

To support their views supervisors argued that disputes involving foremen collective bargaining issues threatened to disrupt wartime production. Accordingly, it was contended that the N.W.L.B. could properly assume jurisdiction of these controversies. Supervisors' spokesmen further asserted that the N.W.L.B. would not improperly invade the N.L.R.B. sphere of jurisdiction because the latter Board, by virtue of the *Maryland Drydock* decision, had opened an area which the N.W.L.B. could properly occupy. On this point it was argued that since the N.L.R.B. held that "it may not require employers to bargain with supervisors the matter [was] exclusively within the War Labor Board jurisdiction."⁸⁰ In contrast to the views expressed by foremen union representatives, employers' spokesmen contended that the N.W.L.B. could not appropriately assume authority over foremen collective bargaining controversies. Because the N.L.R.B. had already refused to afford legal protection to supervisors' labor organizations, and inasmuch as the N.W.L.B. was required to conform to the rulings of the N.L.R.B., it was urged that the N.W.L.B. had no right to compel employers to bargain collectively with foremen unions. Employer representatives further argued that foremen were actually "employers," and accordingly the N.W.L.B. had no right to exercise jurisdiction over any foremen-management dispute. Thus employers contended that the N.W.L.B. was without authority to settle any foremen grievance, regardless of whether the dispute involved issues of collective bargaining, or matters relating to wages, hours, seniority, or other conditions of employment.⁸¹

⁷⁹ See Executive Order 9017, dated January 12, 1942; Executive Order 9250, dated October 3, 1943; and War Labor Disputes Act, 57 Stat. 163, Sec. 7(a)(2). See chap. 7 for an analysis of the relationship between the N.W.L.B. and the N.L.R.B.

⁸⁰ "W.L.B.'s Jurisdiction Over Foremen Disputes," *Labor Relations Reporter*, January 10, 1944, vol. 13, p. 566. ⁸¹ *Ibid.*, p. 565.

The N.W.L.B. subsequently ruled that it had no authority to compel employers to bargain with foremen unions. According to the National War Labor Board, a contrary policy would have violated the jurisdictional division between the N.L.R.B. and the N.W.L.B. as set forth in executive orders and in the War Labor Disputes Act. Consequently the General Counsel of the N.W.L.B., in a formal opinion, stated that the Board would not afford legal protection of the foremen's right to collective bargaining.⁸² Shortly after the opinion was rendered, the N.W.L.B. vacated a Regional War Labor Board order which had previously directed the inclusion of foremen in a bargaining unit. In dissolving the Regional Board's order, the N.W.L.B. declared that this matter was "within the exclusive jurisdiction of the National Labor Relations Board."⁸³ Foremen labor organizations were left with no federal protection of their collective bargaining rights. They were not permitted to utilize the machinery afforded by the Wagner Act, nor could they obtain relief from the National War Labor Board. As the *Maryland Drydock* doctrine was promulgated during the war period,⁸⁴ its effect was probably even more onerous to foremen labor organizations because supervisors, like all employees, were morally bound to labor's no-strike pledge. However, as will be indicated later, the practical implications of these decisions were so great that foremen, though probably reluctantly, engaged in many strikes in order to implement their right to collective bargaining.⁸⁵

The Soss Manufacturing Company Doctrine

As indicated, the National Labor Relations Board, before the *Union Collieries* case, had reinstated foremen who had been discharged because of union activities.⁸⁶ After the *Maryland Drydock* decision was announced, the question again arose as to whether the Board would protect supervisors from discriminatory discharge. If the Board abandoned its previous rule in this respect, foremen would have been deprived of all protection under the Wagner Act. Employers argued that in view of the *Maryland Drydock* decision, the Board, to remain consistent, was compelled to rule that foremen could expect no protection under the Wagner Act.⁸⁷ Since the Board had ruled that foremen could not be regarded as "employees" under the terms of the Wagner Act for purposes of collective bargaining, the employer representatives, testifying in a hearing on the issue, contended that foremen could not be considered as "em-

⁸² "Status of Foremen Before W.L.B.," *Labor Relations Reporter*, June 6, 1944, vol. 14, p. 415. However, the N.W.L.B. did rule that it would settle disputes between management and foremen involving wages, seniority, sick leave, vacations, and other conditions of employment.

⁸³ *In re Two-States Telephone Company*, 15 War Labor Reports (1944), 441, 442.

⁸⁴ As noted, the decision was rendered on May 11, 1943.

⁸⁵ See *infra*, pp. 186-188.

⁸⁶ See *supra*, pp. 171-172.

⁸⁷ "Rights of Foremen Under the Wagner Act," *Labor Relations Reporter*, February 21, 1944, vol. 13, p. 745.

ployees" for other purposes of the Act. If an employer was not compelled by law to bargain with a foremen's union, the employer should be equally free to discharge a foremen for union activities. Evidence revealed that employers did believe that the *Maryland Drydock* decision permitted such discharges. From May 11, 1943, the date of the *Maryland Drydock* decision, until February 15, 1944, the Foremen Association of America⁸⁸ alone reported that it had filed eight charges alleging unlawful discharge, and was considering similar action in forty-five other cases.⁸⁹

Reilly and Houston faced a problem in this situation of no small magnitude. Either they had to remain consistent and rule that foremen, employed in general mass production industry, were not "employees" for any purpose under the Wagner Act, or they would be required to affirm an apparent illogical position that such foremen were "employees" in one sense, but were "employers" for purposes of collective bargaining. Clearly the latter position would greatly weaken the *Maryland Drydock* decision and might subject the majority Board members to the charge of inconsistent reasoning. Nonetheless the N.L.R.B.⁹⁰ held that foremen were employees under the Act insofar as protection against employer discrimination was concerned. The majority members stated that "supervisors are 'employees,' and that supervisory status does not by its own force remove an employee from the protection . . . of the Labor Relations Act."⁹¹ But the N.L.R.B. majority members still limited such protection only to unfair labor practices involving unlawful discharge. They reasoned that the *Soss* decision did not "depart" from the rulings in the *Maryland Drydock* case, but it "reaffirmed" them, and an employer was still not "subject to an order to bargain with employee supervisory groups."⁹² Reilly and Houston, in effect, apparently took the position that at times foremen engaged in mass production industry, in their relationship to their employers, were "employees," but on other occasions, the very same supervisors were no longer "employees," but were "employers." Indeed, foremen then must be of true chameleon character!

Foremen Recognition Strikes

Though the *Maryland Drydock* decision precluded foremen from obtaining statutory protection while exercising their right of collective bargaining, the National Labor Relations Board ruling, of course, did not outlaw foremen labor organizations. In spite of the *Maryland Drydock* doctrine, foremen continued to organize in large numbers. It is reported

⁸⁸ The F.A.A. was an independent foremen's union.

⁸⁹ "Rights of Foremen Under the Wagner Act," *op. cit.*, p. 745.

⁹⁰ Millis concurred in the decision of the majority, but not in their reasoning. He appropriately stated that "unlike my colleagues, it is unnecessary for me to distinguish my position in this case from the majority holding in the *Maryland Drydock* case." *In the matter of the Soss Manufacturing Company*, 56 N.L.R.B. 354 (May 8, 1944).

⁹¹ *Ibid.*, p. 353.

⁹² *Ibid.*, p. 353.

that the Foremen Association of America, an unaffiliated foremen's labor organization, grew from one chapter and 350 members in September, 1941 to 281 chapters and 28,240 members in 1945.⁹³ Though the *Maryland Drydock* decision was rendered in 1943, the Foremen Association of America increased its membership from 7 chapters and 10,000 members at the end of 1942 to 148 chapters and 32,000 members at the end of 1944.⁹⁴ Moreover, the Foremen Association of America successfully negotiated contracts with the American Stove Company and with the Ford Motor Company.⁹⁵

In some instances, however, employers refused to recognize foremen unions, and refused to bargain collectively with these organizations. Some of the reasons advanced by employers as justification for their opposition to supervisor unions included the arguments that (1) supervisors had no need for collective bargaining; (2) they could adjust grievances by individual action; (3) if organized, they would no longer perform their duties properly; and (4) such organizations constituted a threat to the free-enterprise system.⁹⁶ Students of labor relations will quickly recognize the striking similarity of these arguments to those advanced by employers who resisted the development of rank-and-file unions.

Notwithstanding employer contentions, some foremen still believed that collective bargaining offered a method whereby their grievances could be effectively adjusted. As they organized into unions, foremen, of course, wanted their associations to be recognized by top management. Confronted with recalcitrant employers, foremen, as indicated, could seek no relief from either the National Labor Relations Board or the National War Labor Board. There was, therefore, apparently but one alternative remedy to implement their right to collective bargaining — the utilization of the strike. By resorting to industrial warfare, foremen unions, similar to the general practice of rank-and-file labor organizations in pre-Wagner Act years, might compel management to bargain collectively. As noted above, Chairman Millis warned his colleagues that foremen organizational strikes would be encouraged by their refusal to protect foremen's collective bargaining rights. Actually such collective bargaining strikes, rendered unnecessary by the Wagner Act, did take place.

One strike resulting from an employer's refusal to bargain with a foremen's union paralyzed the production of coal in the eastern mining area. To remedy this situation the President of the United States was compelled to seize many of the mines.⁹⁷ Foremen organizational strikes

⁹³ *Monthly Labor Review*, February, 1946, vol. 62, p. 243.

⁹⁴ National Labor Relations Board, *Tenth Annual Report* (1945), p. 31.

⁹⁵ "New Contracts for Foremen's Union," *Labor Relations Reporter*, November 27, 1944, vol. 15, p. 369.

⁹⁶ *In the matter of Maryland Drydock Company*, p. 746.

⁹⁷ "Foremen's Strike: Parties at Impasse," *Labor Relations Reporter*, September 11, 1944, vol. 15, p. 27.

which occurred in the Detroit industrial area also seriously disrupted war production in that region: "In April, 1944 . . . foremen in thirteen industrial plants of six corporations walked out. Within two weeks of the start of the strike, Packard with its 35,000 employees closed down [for a few days] because its production did not measure up to Army specifications."⁹⁸ Additional evidence indicates that foremen, after the *Maryland Drydock* decision, made widespread use of the collective bargaining strike. Table 2 indicates the number of strikes for recognition purposes effected throughout industry in 1943 and 1944. As noted, the *Maryland Drydock* decision was rendered by the N.L.R.B. during 1943. In explaining the great increase in the frequency of these strikes in 1944 as compared with 1943, the Bureau of Labor Statistics reports: "Work stoppages over questions of union recognition and bargaining rights increased in 1944 both numerically and proportionately. This was due in part to strikes over bargaining rights for foremen and supervisory workers. There were at least 30 such strikes in 1944, involving about 130,000 workers and over 650,000 man-days of idleness."⁹⁹ Foremen recognition strikes, apparently encouraged by the *Maryland Drydock* decision, appear to have seriously disrupted war production in 1944. Whereas the total number of recognition strikes in 1943 was comparatively small, the number increased considerably in 1944. And as the Bureau of Labor Statistics concluded, the sharp increase in the number of workers involved in these strikes was largely attributable to foremen recognition work stoppages.

In the light of these considerations, it seems that many of the 1944 supervisors' recognition strikes would not have occurred had foremen been afforded the opportunity to settle their collective bargaining disputes with the aid of the National Labor Relations Board. Legal protection of their right to self-organization and collective bargaining would have eliminated the causes for these work stoppages. Accordingly, it appears that the N.L.R.B. must bear a good share of the responsibility for these war-time foremen recognition strikes.

The Packard Motor Car Company Case

Prompted perhaps by the unsatisfactory consequences of the *Maryland Drydock* doctrine, and because of its inconsistency with the *Soss* decision, the N.L.R.B. held another hearing on the foremen union problem.¹⁰⁰ This investigation involved the Packard Motor Car Company. As a result of the hearing, Board Member Houston shifted his position and voted with Millis to afford legal protection to all foremen in the exercise of their right

⁹⁸ *New York Times*, March 11, 1947, p. 1.

⁹⁹ *Monthly Labor Review*, May, 1945, vol. 60, p. 967.

¹⁰⁰ "Bargaining Rights of Foremen Restudied," *Labor Relations Reporter*, March 5, 1945, vol. 16, p. 2.

TABLE 2. COMPARISON OF RECOGNITION STRIKES

	1943	1944
Total Number Recognition Strikes	92	202
Workers Involved.	14,440	169,958
Man-days Lost to War Production	71,168	853,118

Source: *Monthly Labor Review*, May, 1945, vol. 60, p. 968 and May, 1944, vol. 58, p. 937.

of collective bargaining.¹⁰¹ Now supervisors throughout industry may form labor organizations, and these unions will ordinarily be designated as appropriate units for the purpose of collective bargaining under the terms of the Wagner Act. Employers who refuse to negotiate with their representatives on a voluntary basis can be legally compelled to bargain collectively. Strikes by foremen for the purposes of recognition and collective bargaining are accordingly rendered unnecessary.

An important feature of the *Packard* decision was the classifying of foremen of different levels of authority into one unit. As noted, prior to the *Maryland Drydock* case, the Board had refused to group in one bargaining unit foremen of different ranks.¹⁰² In the instant case, however, the N.L.R.B. included general foremen, foremen, assistant foremen, and special assignment men in one bargaining unit. Departing from the former policy, the N.L.R.B. declared that a single bargaining unit comprised of several levels of supervisors is appropriate for the purpose of collective bargaining where "their duties and responsibilities are substantially alike."¹⁰³ It was pointed out that though the foremen were of different ranks, no supervisor was permitted to discharge a subordinate foreman, or otherwise alter his conditions of employment, without approval from top management. The union successfully contended, moreover, that collective bargaining would be impaired if the Board designated four separate units.

Bulking large as a causal factor in the change of the Board's foremen union policy was the supervisors' collective bargaining strikes. The N.L.R.B. members declared that they could not "shut [their] eyes to these developments."¹⁰⁴ Moreover, the Board pointed out that foremen were

¹⁰¹ *In the matter of Packard Motor Car Company*, 61 N.L.R.B. 4 (March 26, 1945). Reilly dissented from the majority position. His arguments substantially duplicated those presented by him in his dissent in the *Union Collieries* case, and in the majority opinion in the *Maryland Drydock* case.

¹⁰² See *In the matter of Boeing Plane Company*, 45 N.L.R.B. 630 (1942), and *supra*, *In the matter of the Stanley Company of America*.

¹⁰³ *In the matter of Packard Motor Car Company*, *op. cit.*, p. 24. Subsequently, the Supreme Court upheld this N.L.R.B. position. When the high Court reviewed the *Packard* case, it stated that "there is . . . evidence that while the foremen included in this unit have different degrees of responsibility and work at different levels of authority they have a common relationship and . . . inclusion of all such grades of foremen in a single unit is appropriate." *Packard Motor Car Company v. N.L.R.B.*, 67 S. Ct. 789, March 10, 1947. See *infra*, p. 191 for a further discussion of the Supreme Court's review of the *Packard* case.

¹⁰⁴ *Ibid.*, p. 14.

"employees" within the meaning of the law and as such were entitled to the full protection of the Wagner Act. Rejecting the employer's argument that foremen had no need to organize, the majority of the Board pointed to the elaborate analysis made by the National War Labor Board panel which concluded that foremen had substantial grievances which could be adjusted by collective bargaining.¹⁰⁵ Once more the Board emphasized that foremen have the right to form and join labor organizations apart from the Wagner Act. "This is a fundamental right, the right of free association, which was not created, but implemented by the Act." In addition, the Board was not too disturbed over the question of whether or not unionized foremen would tend to become less loyal to management in their relations with the rank-and-file employees. Though the Board refused to consider such an argument as pertinent, the N.L.R.B. attempted to allay such fears by pointing out that the same argument was advanced by anti-union employers when rank-and-file workers organized. Furthermore the Board stated that the company still had the right to discharge any foreman who failed to perform his job faithfully and efficiently. Thus the N.L.R.B. reversed the *Maryland Drydock* doctrine and held that all foremen, as other employees, may organize and bargain collectively under the protection of the National Labor Relations Act.

Subsequent developments after the original *Packard* decision may be noted briefly. After the foremen union involved in this dispute won the representation election,¹⁰⁶ the Board certified the organization as a statutory bargaining agent. But as the company still refused to bargain with the labor organization, a complaint was issued which directed a hearing in the matter. On July 21, 1945, an N.L.R.B. trial examiner recommended that the N.L.R.B. issue an order directing that the company bargain with the foremen's labor union.¹⁰⁷ Subsequent to the *Packard* decision, Millis resigned from the N.L.R.B. and Paul Herzog, Chairman of the New York State Labor Relations Board, replaced him as head of the National Labor Relations Board. Those who were aware of the New York Board's policy with respect to supervisors' labor organizations¹⁰⁸ expressed no great surprise when Herzog affirmed the *Packard* doctrine. In validating the trial examiner's recommendation, he stated "it is not for this Board to determine whether supervisory employees, sensing inequality of bargaining power, should seek to better their lot by exercising the right of free association. They have already done so." He further declared that "it is better that a Board dedicated to encouraging the bargaining process move forward, not backward . . . and continue to put a premium on the

¹⁰⁵ See "Report and Recommendations of the Panel," *op. cit.*, pp. 645-755.

¹⁰⁶ "Employer Opposition to Foremen's Bargaining," *Labor Relations Reporter*, April 16, 1945, vol. 16, p. 209.

¹⁰⁷ "Foremen's Unions: Next Step in Test," *Labor Relations Reporter*, July 30, 1945, vol. 16, p. 755.

¹⁰⁸ See pp. 182-183.

conference table rather than on the harsh arbitrant of industrial war. The more difficult the problem, the more important it is that the stage be set for men to sit down and reason together."¹⁰⁹

Desiring to test the case in the courts, the Packard Company refused to abide by the N.L.R.B. bargaining directive and instead appealed the ruling to a federal circuit court. The company's appeal resulted in a victory for the National Labor Relations Board. Upholding the right of foremen to organize and to bargain collectively under the protection of the National Labor Relations Act, the Court stated that though a "foreman is part of the front line of management in his obligation to get out work, to negotiate grievances, and to perform the manifold responsibilities . . . in his relationship to his employer with reference to his own wages and conditions of labor is an employee, entitled to the benefits" of collective bargaining rights and representation under the Wagner Act.¹¹⁰ As the foremen involved in the *Packard* decision were represented by a union having no affiliation with a rank-and-file organization, the Court had no reason to decide the possible effect of a supervisors' organization being affiliated with a national union representing ordinary employees. On this point, however, the Court indicated that a foremen's labor organization under such circumstances would probably not be deemed appropriate under the Wagner Act. For example, if a foremen's union is affiliated with the C.I.O., the supervisors' union possibly could expect no protection from the Wagner Act.

Because of the seriousness of the foremen union problem, it was apparent that the final settlement of the issues awaited Supreme Court and Congressional action.¹¹¹ On March 10, 1947, the high Court finally reviewed and sustained the lower court's decision in the *Packard* case.¹¹² In upholding the authority of the N.L.R.B. to compel an employer to bargain collectively with a union composed of foremen, Justice Robert H. Jackson, speaking for the majority, stated that the fact that these foremen are employees (for purposes of the National Labor Relations Act) "is too obvious to be labored" and that there is nothing in the Wagner Act to indicate that Congress intended to deny them its benefits.¹¹³ The Supreme Court did not accept the argument that foremen should be excluded from

¹⁰⁹ National Labor Relations Board, *Tenth Annual Report* (1945), p. 34.

¹¹⁰ *N.L.R.B. v. Packard Motor Car Company*, Case No. 10157, August 12, 1946 (CCA-6).

¹¹¹ See *infra*, pp. 195-196 for a treatment of the attempts made by Congress to deal with the foremen union problem.

¹¹² *Packard Motor Car Company v. N.L.R.B.*, 67 S. Ct. 789, March 10, 1947. The Supreme Court was divided 5-4 in its decision. Justices Robert H. Jackson, Frank Murphy, Hugo L. Black, Stanley F. Reed, and Wiley B. Rutledge constituted the majority while Chief Justice Fred M. Vinson and Justices Felix Frankfurter, William O. Douglas, and Harold H. Burton composed the minority. The minority opinion echoed in part one argument advanced by N.L.R.B. Member Reilly. Thus Justice William O. Douglas stated that "if foremen are 'employees' under the [Wagner Act] so are vice-presidents, managers, assistant managers, superintendents — indeed, all who are on the payroll of the company, including the president. The minority opinion also warned that the majority's decision might "obliterate the line between management and labor."

¹¹³ See *Chicago Sun*, March 11, 1947, p. 5.

the statute's terms because they act in the interest of an employer. The Court in this respect stated that "every employee from the very fact of employment in the master's business is required to act in his interest."¹¹⁴ As a result, the Supreme Court decided that the foremen engaged throughout industry as well as rank-and-file workers were entitled to the protection afforded by the Wagner Act. As noted, however, the foremen's union involved in the *Packard* case was not affiliated with any production workers' labor organization. Accordingly the high Court at this time did not decide whether a foremen's union affiliated with a rank-and-file organization could expect legal protection of the right to collective bargaining.¹¹⁵

Application of the Packard Doctrine

Evidence proved that the foremen involved in the *Packard* case possessed comparatively minor supervisory positions. Their authority was limited, and their jobs were largely routine. In addition, while performing their duties, the supervisors exercised a minimum amount of independent discretion and initiative. In describing their status, the National Labor Relations Board declared that they were more the "traffic cops" of industry than the independent foremen of the 1900's. But the Board, in a later case, made it clear that even supervisors of high levels of authority are entitled to protection of the Wagner Act.¹¹⁶ According to the N.L.R.B. even though foremen duties be varied and complex, and their responsibilities great, the provisions of the Wagner Act were applicable. And further, the N.L.R.B. stated that "we do not believe that the application of the Act to foremen can or arbitrarily should be made to depend upon the type of industry involved, whether mass production or non-mass production, or upon the variation in the duties and responsibilities of foremen from company to company."¹¹⁷ Expanding this principle, the N.L.R.B. later ruled that the Wagner Act protected foremen even though they possessed the power to hire and discharge ordinary employees subordinated to them.¹¹⁸ Such a case involved a group of chain store managers who organized a supervisors' union. Under the policy established by the company, the store managers exercised the authority to (1) hire and discharge all employees under their supervision; (2) set rates of pay, vacations, and hours of employment of such ordinary workers; (3) establish merchandising policies of their local stores; and (4) exercise general supervision over all operational activities of their respective stores. In rejecting the company's contention that the supervisors involved were not employees within the meaning of the Wagner Act, the Board declared

¹¹⁴ See *New York Times*, March 11, 1947, p. 1.

¹¹⁵ See *infra*, pp. 194-201, for a further discussion of this problem.

¹¹⁶ *In the matter of L. A. Young Spring & Wire Corporation*, 65 N.L.R.B. 298 (1946).

¹¹⁷ *Ibid.*, p. 301.

¹¹⁸ *In the matter of the Great Atlantic & Pacific Tea Company*, 69 N.L.R.B. 463 (1946).

that "they are not . . . considered a part of the nation-wide supervising hierarchy which exercises managerial authority and policy making functions with respect to all the company's nation-wide operations."

Such a liberal interpretation of the Wagner Act apparently implied that all levels of supervision in all types of industries were within the law's scope of protection. The only supervisors to be excluded under this interpretation would be those who participate in the formulation of general company policies, as distinguished from managerial authority and policy making discretion extending over only a segment of the operations of the company involved. Contrary to the rule expressed in the *Union Collieries* case and in the *Packard* case, foremen who possessed great authority and responsibility were not excluded from the terms of the law. Only the higher reaches of company managers would thus be beyond the scope of N.L.R.B. authority. It appears that as long as foremen believed that their economic interests would be furthered by unionization, and as long as the effects of such organization did not contravene the purposes of the Wagner Act, the N.L.R.B. apparently felt that it did not have the authority to deny them the protection of the National Labor Relations Act.

In view of the corporate structure of American business, the point at which such denials of the Act would be reached could only be determined through N.L.R.B. rulings, court decisions, or possible Congressional action. In one case the N.L.R.B. stated that the test to determine when foremen should cease to be considered as representatives of the employer for Wagner Act purposes and instead should be accorded all the protection and rights that the law confers upon "employees" is whether or not they are "acting in their own interests," as for example, "when seeking to better the terms and conditions of their employment."¹¹⁹ Even the highest reaches of the managerial hierarchy can be considered as acting in their "own interests" if they should organize to advance their economic position. However, there is little practical reason to believe that members of top management will organize into labor organizations to advance their "own interests." Consequently Reilly's *reductio ad absurdum* would probably never be realized in practice.

In another case, the Board ruled that administrative supervisors, such as chief clerks, chief inspectors, and chief cashiers have the same Wagner Act bargaining rights as do "production foremen."¹²⁰ Furthermore the provisions of the National Labor Relations Act were not denied to foremen merely because their duties and responsibilities provided the basis "of good relations with their company's patrons." Such a relationship, the Board stated, constitutes a "normal" function of foremen.¹²¹

¹¹⁹ In the matter of *Federal Mogul Corporation*, 66 N.L.R.B. (1946), 532, 533.

¹²⁰ In the matter of *Celotex Corporation*, 66 N.L.R.B. 744 (1946).

¹²¹ In the matter of *Union Stock Yards Company of Omaha*, 68 N.L.R.B. 770 (1946).

On the other hand the N.L.R.B. had employed the "Globe doctrine" principle¹²² as a limiting factor in the establishment of foremen bargaining units. One typical case involved the organizational activities of assistant foremen, foremen, and departmental superintendents.¹²³ As noted, the N.L.R.B. in the *Packard* case reversed an earlier policy and permitted foremen of unequal ranks to compose a single bargaining unit. In the instant case, however, the departmental superintendents exercised substantially more authority than either the foremen or the assistant foremen. Therefore the N.L.R.B. gave the opportunity to the departmental superintendents to decide by secret ballot whether or not they desired to be grouped in the same unit with the lower categories of foremen. In another case the N.L.R.B. limited the scope of the foremen's bargaining unit when it continued to refuse to group into one unit foremen and ordinary employees of a steel corporation.¹²⁴

The Jones and Laughlin Decision

Though the *Packard* decision re-established the *Union Collieries* doctrine, the case did not settle the question of whether or not the N.L.R.B. would certify a foremen's labor organization which was affiliated with a rank-and-file labor organization. Before the *Maryland Drydock* case, the Board, as noted, had issued a certification under such circumstances and consequently no great surprise accompanied the N.L.R.B. reaffirmation of this policy. After a hearing was conducted on the issue,¹²⁵ the N.L.R.B. entertained a representation petition from a foremen's union even though it was affiliated with a parent labor organization which represented the company's rank-and-file employees.¹²⁶ Evidence revealed that the foremen's union was an integral part of the parent organization, the United Mine Workers of America, then affiliated with the A.F.L., which bargained for the production workers. Controlling factors which prompted the N.L.R.B. to reinstate the *Godchaux Sugar* doctrine¹²⁷ included: (1) the freedom of choice of bargaining agents guaranteed by the Wagner Act to all employees; (2) the fact that foremen are free to choose such a

¹²² See *In the matter of Globe Machine and Stamping Company*, 3 N.L.R.B. 294 (1937). As originally formulated, the "Globe doctrine" in general was employed to allow craft workers to decide whether they desired to be represented by a craft union or by an industrial union. Certain conditions, however, had to exist before the N.L.R.B. would permit the application of the doctrine. Thus the craft union involved was required to possess a substantial number of members; the function performed by the members had to be historically regarded as a craft; the craft union must have attempted to organize. Further refinement of the "Globe doctrine" was made by the N.L.R.B. *In the matter of General Electric Company*, 58 N.L.R.B. 57 (1944). See p. 160 for an analysis of the *General Electric* case.

¹²³ *In the matter of Midland Steel Products Company*, 65 N.L.R.B. 997 (1946). See also *In the matter of Kelsey-Hays Wheel Company*, 66 N.L.R.B. 520 (1946).

¹²⁴ *In the matter of Wheeling Steel Corporation*, 69 N.L.R.B. 208 (1946).

¹²⁵ "Foremen's Bargaining Rights: Mixed Unions," *Labor Relations Reporter*, October 8, 1945, vol. 17, p. 156. Employer representatives bitterly opposed such N.L.R.B. certifications declaring that "every vestige of management control would be destroyed if the Board found that the [rank-and-file] union could act as the representative of the foremen."

¹²⁶ *In the matter of Jones and Laughlin Steel Corporation*, 66 N.L.R.B. 386 (1946).

¹²⁷ See *supra*, *In the matter of Godchaux Sugar Company*.

representative independent of the National Labor Relations Act. The N.L.R.B. pointed out that the Wagner Act provides full freedom to all employees to choose any legitimate labor organization as their bargaining agent. The N.L.R.B. further declared that foremen could seek to establish such a bargaining agent through the peaceful and democratic machinery of the N.L.R.B., or else attempt to achieve this recognition by engaging in economic warfare. "By closing the door to the first of these alternatives, the Board would simply turn the direction of the struggle for union recognition from the ballot box to the economic battlefield. We would thus find ourselves in the anomalous position of promoting strikes for union recognition, the very kind of strikes which the Act intended to diminish."¹²⁸

Reilly again sharply disagreed with the majority members (Herzog and Houston) of the Board. He supported the corporation's position, stating that the majority's decision "seriously impaired the ability of the operators effectively to manage their mines." Again Reilly apparently avoided the basic question in the case — whether foremen, under the terms of the Wagner Act, were free to select any legitimate labor organization as their bargaining representative. Reilly became so opposed to the N.L.R.B. foremen union policy as established in the *Packard, Young Spring & Wire*, and in the *Jones and Laughlin* cases that he suggested that Congress amend the Wagner Act to preclude N.L.R.B. certification of foremen unions.¹²⁹

Congressional Action

Such Congressional action, as propounded by Reilly and by some employer groups, was included in the "Case Bill" vetoed by President Harry Truman. Specifically the "Case Bill"¹³⁰ provided that any supervisor having the authority to determine or to make recommendations with respect to ordinary employees' conditions or terms of employment could not be considered as an "employee" under the terms of the National Labor Relations Act. This proposed amendment to the Wagner Act, if adopted, would have precluded the N.L.R.B. from affording the protection of the law to foremen exercising their rights of collective bargaining. Not only would such N.L.R.B. action be forbidden in cases involving supervisors engaged in general mass production industry, but the proposal would also place foremen labor organizations historically established, such as maritime supervisors' unions, beyond the protection of the Act. Moreover, the proposed amendment would apparently prevent a foreman discrimina-

¹²⁸ In the matter of *Jones and Laughlin Steel Corporation*, op. cit., p. 400.

¹²⁹ In fact, Reilly not only suggested this action in his dissenting opinion in the *Jones and Laughlin* case but reaffirmed it when he left the N.L.R.B. in August, 1946. *New York Times*, August 12, 1946, p. 14.

¹³⁰ H.R. 5262, 79th Congress convened January 3, 1945.

torily discharged from seeking relief under the Wagner Act. But when President Truman considered this proposal, he objected to it on the ground that its adoption would promote industrial strife. He declared in part that "this section would strip from supervising employees the rights of self-organization and collective bargaining now guaranteed them under the National Labor Relations Act. I fear that this section would increase labor strife, since I have no doubt that supervisory employees would resort to self-help to gain the rights now given to them by law."¹³¹

The Labor-Management Relations Act, 1947, effectively removed foremen from the protection of the National Labor Relations Board.¹³² Under the provisions of this law, the N.L.R.B. may not certify foremen's unions for the purposes of collective bargaining. Since the act makes no distinction between supervisors' unions affiliated with rank-and-file organizations and those which are not, employers are relieved of all legal obligations to bargain with foremen unions. In addition, foremen discharged by employers because of labor organization activities may not be reinstated by the Board.

An Analysis of the Jones and Laughlin Doctrine

Before the Circuit Court issued the opinion in the *Packard* decision which dealt in part with the appropriateness of a unit of foremen represented by a rank-and-file labor organization,¹³³ the issue was indirectly presented to a federal district court. However this case is of little value in determining the legality of the "mixed union." The basic question presented to the District Court involved the issue of whether the federal government could properly execute a contract with a rank-and-file union representing a foremen's bargaining unit while the government was operating the mines. The President of the United States had previously ordered the coal mines seized on May 22, 1946,¹³⁴ under the authority of the War Labor Disputes Act.¹³⁵ The order effecting the seizure directed the Secretary of the Interior, J. A. Krug, to negotiate a contract with the United Mine Workers of America resolving the controversy over the establishment and the administration of a health and welfare fund demanded of the mine operators by the miners' union.¹³⁶ After the President vetoed the "Case Bill," which would have precluded N.L.R.B. protection

¹³¹ "President's Standards for Labor Legislation," *Labor Relations Reporter*, June 17, 1946, vol. 18, p. 123.

¹³² Sec 2(3) For purposes of the Labor-Management Relations Act, 1947, foremen are not treated as "employees," and as a result they have been stripped of all benefits and privileges of the law. On the other hand, the Act, Sec 14(a), does not prohibit supervisors "from becoming or remaining a member of a labor organization."

¹³³ See p. 191. Again it is to be emphasized that this issue was not pertinent in the *Packard* case. The foremen's labor organization involved in that matter was not affiliated with any production employees' labor organization. But nonetheless the Circuit Court suggested that if the issue were presented to that Court, such a foremen's unit would probably be held inappropriate under the terms of the Wagner Act. ¹³⁴ Executive Order 9728, dated May 22, 1946. ¹³⁵ 57 Stat. 163.

¹³⁶ "Plant Seizure as Strike Control: A Crucial Test," *Labor Relations Reporter*, May 27, 1946, vol. 18, p. 47.

of foremen unions, the United States Coal Mines Administration contemplated the execution of a contract with the U.M.W.A. which, in part, covered the mine foremen.¹³⁷ Specifically the proposed contract recognized the U.M.W.A. as the bargaining agent for both the production workers and for mine foremen. In order to forestall the execution of the contract, mine operators filed, on June 13, 1946, a complaint in the Federal District Court at Washington, D.C. The operators sought to restrain the Coal Mines Administration from executing the contract with the U.M.W.A., which in part provided for the representation of the foremen by the production workers' union, on the grounds that the union had no legal right to bargain for the supervisors.¹³⁸

But the District Court denied the petition of the company, declaring that "the government managers of seized properties, like private owners, have unrestricted authority in bargaining with labor unions"¹³⁹ Moreover, the Court declared that the operators had no legal standing to contest the contract because the agreement only covered the government seizure period. The Court pointed out that the government's operation of the mines was only temporary, and that management would be free to recognize or not to recognize the U.M.W.A. as the bargaining representative of the foremen when the properties were returned to private control. It should be emphasized that the decision of the District Court did not rule on the legality of the issue under circumstances where a company opposed an N.L.R.B. certification of a foremen's union which is affiliated with a rank-and-file labor organization. In the instant case, the only point of law involved was the propriety of a government agency voluntarily recognizing such a union. The Court would, no doubt, render the same ruling where a private employer desired to execute such a contract. Consequently, with the legal problem cleared, the Coal Mines Administration and the U.M.W.A. on July 17, 1946, signed a contract covering the supervisory employees.¹⁴⁰

Before the Supreme Court was able to decide whether or not the N.L.R.B. had the authority to certify supervisors' labor organizations affiliated with rank-and-file unions, the Congress, as noted above, passed the Labor-Management Relations Act, 1947, which prohibited the certification of any foremen's union. On May 19, 1947, however, thirty-five days before the Congress overrode a Presidential veto and enacted the 1947 labor law, the Supreme Court did hold that a plant protection employees' union which was affiliated with a rank-and-file organization could be

¹³⁷ "Contracts for Foremen in Seized Coal Mines," *Labor Relations Reporter*, June 24, 1946, vol. 18, p. 147. ¹³⁸ *Ibid.*, p. 148.

¹³⁹ "Bargaining by Foremen: Next Step in Test," *Labor Relations Reporter*, July 1, 1946, vol. 18, p. 171.

¹⁴⁰ "Government-Union Pact Covering Supervisors," *Labor Relations Reporter*, July 22, 1946, vol. 18, p. 223.

certified by the N.L.R.B. for purposes of collective bargaining.¹⁴¹ In the light of this decision, it appears entirely probable that the Supreme Court would have upheld the power of the N.L.R.B. to award certifications to foremen unions affiliated with rank-and-file labor organizations.

Opponents of the N.L.R.B. *Jones and Laughlin* doctrine stress in part that its effect would seriously limit the freedom of ordinary workers to select bargaining representatives of their own choosing. Under the assumption that the foremen's bargaining position would be strengthened by a powerful rank-and-file union, it has been contended that foremen would actively solicit members for the production workers' trade union. As noted, such a labor organization would bargain not only for the rank and file, but for the supervisors as well. Confronted with the "suggestion" of his supervisor to join the union, a production employee, according to this argument, would become a member in order to curry the favor of his foreman, or he would join out of fear of losing his job. Reilly declared that the effect of the *Jones and Laughlin* doctrine with respect to the rank-and-file employee would be "catastrophic."¹⁴² If such effects of this doctrine were realized, a fundamental principle of the Wagner Act would be violated, and the N.L.R.B. certainly should refuse certifications to foremen labor organizations affiliated with rank-and-file unions. This argument, however, ignores the fact that a foreman, whether or not organized, in his relationship to the ordinary worker, represents the employer. In respect to his activities with the rank and file, any foreman, for the purposes of the Wagner Act, implicates his employer. One of the earliest principles established by the N.L.R.B. makes an employer responsible for the conduct of his foremen. The N.L.R.B. has consistently held that an employer violates the Wagner Act when his foremen interfere with the right of production employees to join unions of their own choosing.¹⁴³ Similarly, a supervisor implicates an employer in an unfair labor practice where the foreman has interfered with the formation and administration of a rank-and-file labor organization.¹⁴⁴

In view of such a policy, an employer who is anxious to protect himself against charges of unfair labor practices stemming from his foremen's conduct must establish rules of neutrality with respect to rank-and-file labor organization, and in addition he must discipline any foreman who violates such regulations. When a company had instituted such a neutrality program, the N.L.R.B. has held that an employer did not violate

¹⁴¹ *N.L.R.B. v. Jones and Laughlin*, 67 S. Ct. 1274, May 19, 1947. See p. 210 for additional treatment of this Supreme Court decision.

¹⁴² *Supra*, in the matter of *Jones and Laughlin Steel Corporation*.

¹⁴³ See *In the matter of William Randolph Hearst*, 2 N.L.R.B. 530 (1937) enforced 102 Fed. (2d) 658 (CCA-9, 1939).

¹⁴⁴ Foremen who attend rank-and-file union meetings, participate in such meetings, join production workers' labor organizations, serve as officers or committee men of rank-and-file unions, or circulate petitions on behalf of such organizations cause employers to violate the Wagner Act. The specific violation, of course, would be employer domination of a labor organization. See Teller, *Labor Disputes and Collective Bargaining*, p. 816.

the Wagner Act when he required a unionized foreman, interfering with the operations of a rank-and-file labor organization, to cease his activities, or to withdraw from his union, or to leave his job.¹⁴⁵ In this manner, the N.L.R.B. recognized that an organized foreman can implicate his employer in an unfair labor practice, and further, intimated that an employer must set up rigid rules of neutrality for his unionized supervisors. An employer who demands that an organized foreman either cease interfering with a rank-and-file union or be demoted or discharged demonstrates that the company does not sanction the labor union which the supervisor apparently supports.

One typical case involved a foreman, a member of a production employees' union, who actively promoted that union among unorganized employees. By engaging in such conduct the supervisor violated a company rule requiring that all foremen remain strictly neutral with respect to rank-and-file labor organizations. To protect himself against an unfair labor practice charge the employer demoted the foreman to the ranks of the ordinary workers. In rejecting the foreman's contention that the employer discriminated against him by such disciplinary action, the Board stated that "it has been recognized that to protect himself against charges of 'assistance' or other illegal conduct that tends to interfere with the freedom of choice guaranteed to employees in . . . the Act, an employer may, without violating the provisions of the Act, require that a foreman, active in promoting a union among those under him, either stop his activities or submit to demotion. In leading instances, the alternative has been to leave the union or the job."¹⁴⁶ Similarly, an employer does not discriminate against a supervisor where he demotes a foreman for making pro-union statements to ordinary workers in violation of an impartially enforced neutrality rule.¹⁴⁷

On the other hand, employers who took no positive action to protect themselves against their foremen's conduct became implicated in unfair labor practices. Failure to establish a foremen neutrality policy, or failure to enforce the program, were held to constitute employers' "silent authorization" for supervisors' activities. An employer who failed to discipline a foreman, though a member of a rank-and-file union, who engaged in anti-union activities violated the terms of the National Labor Relations Act.¹⁴⁸

¹⁴⁵ *In the matter of Marshall Field & Company*, 34 N.L.R.B. 1 (1941); *supra*, *In the matter of Sherwin-Williams Company*.

¹⁴⁶ *In the matter of Ecusta Paper Corporation*, 66 N.L.R.B. (1946), 1204, 1225. Neither did an employer violate the Wagner Act when he discharged a union foreman when the supervisor refused to abide by an employer's work schedule. Thus an organized foreman, as an organized production worker, could be legally discharged for insubordination, inefficiency, disloyalty, or incompetence. See also *In the matter of Swift and Company*, 62 N.L.R.B. 1360 (1945).

¹⁴⁷ *In the matter of Boeing Plane Company*, 46 N.L.R.B. 267 (1942). However, the neutrality rule must be enforced without discrimination. An employer would be required to take similar disciplinary action against foremen making anti-union statements as well as those campaigning for a union. ¹⁴⁸ *In the matter of Barlow Laboratories*, 65 N.L.R.B. 928 (1946).

Similarly an employer who permitted a foreman to retain membership in an inside rank-and-file labor organization, despite the protests of an outside union, engaged in an unfair labor practice. In this case the N.L.R.B. upheld the outside union's contention that the membership of the supervisor in the inside union indicated that the employer preferred the inside organization.¹⁴⁹

Though an employer was under an obligation to establish and impartially enforce neutrality rules with respect to his foremen's union activities, or else face possible litigation under the Wagner Act, the N.L.R.B. ruled that an employer could not discourage legitimate foremen activities by utilizing such rules as a pretext for company unlawful conduct. Mere membership of foremen in a wholly supervisors' union did not, of course, subject an employer to an unfair labor practice charge. Accordingly, an employer was not permitted to use such a pretext to deny to foremen their legitimate bargaining rights under the National Labor Relations Act.¹⁵⁰ Furthermore foremen could not be discharged or demoted for attempting to process grievances of other supervisors when all were members of the same foremen's union. In rejecting the employer's contention that such action on the part of the foremen constituted insubordination, the N.L.R.B. stated that the company's avowed reason was a "pretext seized upon by the respondent to rid itself of [the foremen involved] because of their membership and activity in the Union."¹⁵¹ In addition, an employer could not discharge one supervisor for violating a company union neutrality rule where the company did not take similar action against another supervisor for violation of the same rule.¹⁵² When a company demoted an organized foreman who displayed a union button on his uniform, the N.L.R.B. ruled that the demotion was motivated by anti-union reasons and not because the employer desired to protect his neutrality. Though the Board agreed that the foreman involved could not lawfully wear the union button, the agency reasoned that the employer could merely have ordered the supervisor to remove the button without taking such drastic action.¹⁵³

In contrast, an employer did not violate the Wagner Act when he failed to discipline a foreman who solicited other supervisors for membership in a wholly foreman union. Under these circumstances the Board

¹⁴⁹ *In the matter of Brown Company*, 65 N.L.R.B. 208 (1946). See, however, *In the matter of Mississippi Valley Structural Steel Company*, 64 N.L.R.B. 78 (1945). Here the N.L.R.B. ruled the employer did not interfere with the inside union under circumstances where an outside union actively solicited the membership of a foreman, a member of an inside union.

¹⁵⁰ *In the matter of General Motors Corporation*, 69 N.L.R.B. 191 (1946).

¹⁵¹ *In the matter of American Steel Foundries*, 67 N.L.R.B. (1946), 27, 28.

¹⁵² *Supra*, *In the matter of Boeing Plane Company*.

¹⁵³ *In the matter of General Finance Corporation*, 66 N.L.R.B. 1359 (1946). See also *In the matter of Wells, Inc.*, 68 N.L.R.B. 545 (1946) where the Board found an employer unfair labor practice despite the fact that the company discharged a foreman for actively participating in the functions of a rank-and-file union. Evidence proved that the employer's conduct was motivated by anti-union considerations rather than springing from an attempt to maintain company neutrality.

ruled that such proselyting did not implicate an employer under the Wagner Act unless it could be established that the company positively "encouraged, authorized, or ratified their activities."¹⁵⁴ Though the N.L.R.B. would hold supervisors' anti-union remarks as a violation of the law where uttered to rank-and-file workers, the same expression of disapproval would not ordinarily jeopardize the employer's position under the law when the sentiments were directed by one foreman to another. Foremen could, therefore, campaign for or against a supervisors' union without implicating management. In this respect the Board stated that it did not judge foremen's statements with respect to each other by the same standards that it would "usually apply to similar utterances made by a foreman to his rank-and-file subordinates."¹⁵⁵ Consequently an employer may not, under the pretext of protecting his neutrality, discipline a foreman for encouraging or discouraging other supervisors with respect to membership in a wholly foremen's labor organization.

In view of these considerations, the criticisms leveled against the N.L.R.B. for certifying foremen unions which are affiliated with rank-and-file labor organizations appear to lose much of their validity. Rank-and-file employees were evidently free to join or not to join any legitimate labor organization regardless of whether or not the union represented a foremen bargaining unit. Employers were still vulnerable under the National Labor Relations Act for their foremen's conduct. Any supervisor who promoted any labor organization among ordinary employees subordinate to him could implicate his employer in an unfair labor practice. Consequently the N.L.R.B. would protect any employer who disciplined a foreman in order to maintain company neutrality. As long as the disciplinary action was not motivated by anti-union considerations, an employer could with impunity order a foreman to cease interfering with a rank-and-file labor organization. If he refused, the supervisor may be demoted or discharged, and the N.L.R.B. would not hold the employer taking this action accountable under the Wagner Act. Moreover, an employer actually engaged in an unfair labor practice if he neglected to take positive action to maintain his neutrality. As noted, an employer's failure to establish or to enforce impartially a neutrality policy among his foremen constituted silent authorization for their acts and subjected the employer to N.L.R.B. action.

Conclusions

Economic forces have greatly altered the status of foremen within industry. Changes in technology and in the management function have weakened the former authority and independence of the supervisor and

¹⁵⁴ *In the matter of R. R. Donnelley & Sons*, 60 N.L.R.B. (1945), 635, 638.

¹⁵⁵ *In the matter of B. F. Goodrich Company*, 64 N.L.R.B. (1945), 1303, 1307

have increased his individual expendability. Accordingly the foreman's bargaining power has steadily decreased with respect to his relationship with management. Accompanying this ever-increasing inequality of bargaining power has been the growth of serious problems affecting the economic welfare of supervisory employees. Such problems include lack of security, wages, indefinite terms of employment, vacations, seniority, and sick pay. To settle such grievances some foremen have rejected the process of individual bargaining. Instead, such supervisors, similar to the rank and file, have demonstrated that they desired to adjust their problems through the formation of labor unions and through collective bargaining. Foremen, like all other employees, possess the century-old legal right to engage in such collective action. This means that supervisors may organize and bargain collectively apart from the protection of the National Labor Relations Board. Labor history has demonstrated, however, that some employers have resisted the development of foremen labor organizations. After the N.L.R.B. ruled in the *Maryland Drydock* case that foremen could not bargain under the protection of the Wagner Act, supervisors engaged in many recognition strikes when some employers refused to recognize their representatives.

On March 26, 1945, the N.L.R.B., in the *Packard* case, held that foremen unions not affiliated with rank-and-file labor organizations could bargain under the protection of the Wagner Act. About one year later, the Board decided the *Jones and Laughlin* case and extended this opportunity to supervisors' unions which are affiliated with production workers' organizations. On March 10, 1947, the Supreme Court of the United States sustained the Board's ruling in the *Packard* case.

The Labor-Management Relations Act, 1947, upsets these decisions of the Supreme Court and of the Board. Under its terms, foremen are denied all legal protection of their right to self-organization and collective bargaining. Foremen denied the use of the peaceful machinery of the National Labor Relations Board may rely on their own economic strength to implement their right to collective bargaining.

Chapter 11

ORGANIZATION OF PLANT PROTECTION EMPLOYEES

Nature of the Problem

During the war period almost every plant of any significance employed a plant protection force. Before Pearl Harbor security employees were ordinarily under the direct control of the employers of the plants in which they worked. However, when the United States entered the war, many plant guards became civilian auxiliaries of the armed services. As such they were armed, uniformed, and trained by the War and Navy Departments.¹ Authority for the induction of the civilian guards into the auxiliaries sprang from an Executive Order which authorized and directed "the Secretary of War . . . to establish and maintain military guards and patrols."² On the basis of this Order, the War Department issued a directive which provided for the organization, training, and discipline of civilian militarized guards.³ In addition, these guards were required to enter into a signed agreement with the United States which stipulated that they would faithfully discharge their duties. By virtue of this arrangement, the security employees also agreed to obey the orders of the President of the United States and his duly authorized officers. Upon executing the agreement, the guards, moreover, subjected themselves to the Articles of War and thereby placed themselves under military law. Finally, before assuming the status of a militarized guard, the plant protection employee took the customary oath incident to induction into the Army.⁴ Though security workers were not actually members of the armed forces, such as the soldier or sailor, they had a real and direct relationship to the services.

Notwithstanding their militarized status, plant protection employees, similar to ordinary production workers, developed a set of employment grievances. To adjust such complaints, some guards desired to organize and to bargain collectively under the protection of the National Labor Relations Act. Some employers, however, vigorously contended that the plant guards had no standing under the terms of the Wagner Act. They

¹ "Plant Guards and Bargaining Units," *Labor Relations Reporter*, August 30, 1943, vol. 12, p. 940.

² Executive Order 8972, dated December 12, 1941.

³ Specifically, the War Department directive, dated July 2, 1942, provided in part as follows: "Guard forces at all War Department plants . . . are to be organized, drilled, and instructed as a military unit, subject to the Articles of War. The guard forces will be organized as a civilian auxiliary in the Military Police in all ammunition plants and in plants where the possibility of sabotage is greatest. The guards will be instructed in the Articles of War, the Commanding Officer of the guard force will issue orders and regulations setting forth the duties and responsibilities of the guard force; each guard will be required to take the pledge of loyalty to the U.S.A." Commerce Clearing House, *Labor Cases* (1945), vol. 9, p. 67, 455.

⁴ *N L R B. v. Jones and Laughlin Steel Corporation*, 146 Fed. (2d) 718 (CCA-6, 1944).

generally claimed that the guards were not employees within the meaning of the Act. It was further alleged that unionized security employees could not render their full loyalty to management and consequently they could not faithfully execute management's orders. Subject to union discipline, security workers, according to this argument, would place the interests of organized production workers above those of the company.⁵ These arguments appear strikingly similar to the ones advanced by management with respect to the controversy involving foremen labor organizations.⁶ Thus the N.L.R.B. was compelled to resolve another delicate and difficult wartime problem. Indeed it is reported that "few single questions have been contested in N.L.R.B. proceedings more often during the past . . . years than union organization of plant guards."⁷

Rulings Before Militarization of Security Employees

In an early wartime case the National Labor Relations Board ruled that plant guards were employees under the terms of the Wagner Act, and as such, were entitled to the protection of the Wagner Act even though their duties required them to report infractions of company rules committed by other employees.⁸ As in the leading foremen union case,⁹ the N.L.R.B. rejected the contention that plant protection workers were a part of management and hence could not constitute an appropriate unit for the purpose of collective bargaining. Taking note that the guards involved in one case occupied the lowest place in the company's hierarchy of plant protection employees, the N.L.R.B. pointed out that it could find "nothing in the duties of the patrolmen . . . to warrant depriving them of the right to self-organization and collective bargaining guaranteed under the Act."¹⁰ Evidence revealed that these guards were under the supervision of the chief of the security force, and his captain, lieutenants, and sergeants. In addition, the Board noted that the security employees' union was separate from the one representing the production workers. Thus not only did this plant protection employees' labor organization constitute a separate bargaining unit, but their union, moreover, was not affiliated with any rank-and-file labor organization.

However, when a case arose in which a guards' labor organization was affiliated with a production workers' union, the N.L.R.B. still ruled that the security employees' union constituted an appropriate unit for purposes of collective bargaining.¹¹ At the same time the Board classified

⁵ See *In the Matter of Phelps-Dodge Copper Products Corporation*, 41 N.L.R.B. 973 (1942); *In the matter of Frigidaire Division, General Motors Corporation*, 39 N.L.R.B. 1108 (1942).

⁶ See p. 187. ⁷ *Labor Relations Reporter* (Supplement), January 1, 1945, vol. 15, p. 4.

⁸ *In the matter of Yellow Truck and Coach Manufacturing Company*, 39 N.L.R.B. 14 (1942).

⁹ *In the matter of Packard Motor Car Company*, 61 N.L.R.B. 4 (1945).

¹⁰ *In the matter of Yellow Truck and Coach Manufacturing Company*, *op. cit.*, p. 18.

¹¹ *Supra*, *In the matter of Phelps-Dodge Copper Products Corporation*. See *In the matter of Jones and Laughlin Steel Corporation*, 66 N.L.R.B. 386 (1946) in which the Board similarly ruled that a rank-and-file labor union could represent a bargaining unit composed of foremen.

these guards in a bargaining unit separate and distinct from the one which included ordinary production employees. This distinction was deemed necessary because of the difference in functions and interests of the two groups. Beyond this limitation, security employees were afforded the full opportunity to choose any legitimate bargaining agent as their representative. On this score, the N.L.R.B. declared that neither the company nor the Board could deny to any employee, including the plant protection worker, his statutory right to select whatever legitimate bargaining agent he desired.

Neither did the Board sustain the argument that security workers should be denied the protection of the Wagner Act because they were bonded by a city.¹² Similarly, the fact that these bonded guards carried firearms, inspected all incoming and outgoing vehicles, checked identification cards of all employees, and were required to maintain general law and order within a plant did not place them beyond the protective scope of the National Labor Relations Act. In another case, the Board refused to exclude security employees from the terms of the Wagner Act merely because they guarded the company's property against sabotage and theft.¹³ However in this case the Board rejected the union's request to include part-time guard sergeants in a plant protection employees' bargaining unit. It was believed that because the temporary sergeants had authority and duties distinct from those of the ordinary security workers, the ordinary employees might have been influenced in the exercise of their collective bargaining rights by the sergeants' presence in the bargaining unit. The N.L.R.B. also refused to include plant guards in the same bargaining unit with production and maintenance workers.¹⁴

Rulings After Militarization

Principles established by the National Labor Relations Board with respect to the organization of plant protection employees remained in force after the guards were inducted into Army and Navy auxiliaries. Despite their militarized status, the Board ruled that security workers were still "employees" under the terms of the National Labor Relations Act, and as such, the protection of the law was available to them.¹⁵ Though the armed services were responsible for the guards' training, organization, and discipline, the Board ruled that security workers were still employees in their relationship to the company. Notwithstanding the military control over the guards, it was pointed out that employers still possessed the authority to hire and discharge them, to fix their compensation, and to prescribe their working conditions.

¹² *In the matter of American Brass Company*, 41 N.L.R.B. 783 (1942).

¹³ *In the matter of Bohn Aluminum & Brass Corporation*, 41 N.L.R.B. 1012 (1942).

¹⁴ *In the matter of Automatic Products Company*, 40 N.L.R.B. 941 (1942).

¹⁵ *In the matter of Chrysler Corporation*, 44 N.L.R.B. 881 (1942).

Despite a company's objections, the N.L.R.B. subsequently found a bargaining unit appropriate even though it contained, in addition to ordinary plant protection employees who were members of the Coast Guard Reserve, several corporal members of the Reserve.¹⁶ Evidence presented in this case indicated that the corporals had no power to hire or discharge and were paid on an hourly rate similar to the ordinary protection employees. The Board refused to exclude these corporals even though they "posted" the plant's guard, transmitted messages from the sergeants to the privates of the guard, and periodically inspected the guard.¹⁷ On the other hand, the Board continued to refuse to include militarized plant protection employees in the same unit with production employees.¹⁸ Notwithstanding the contention of a petitioning union, the N.L.R.B. also declined to include first aid employees in the same bargaining unit which contained militarized security workers.¹⁹ Neither would the Board hold as appropriate a bargaining unit composed solely of guard sergeants, on the ground that these employees were part of management, and as such, were excluded from the protection of the Wagner Act.²⁰

Similar to rulings rendered in cases involving non-militarized plant protection employees, the N.L.R.B. subsequently held that a rank-and-file labor organization could properly represent a unit of militarized security workers.²¹ On this score, the Board declared in one case that "freedom to choose a bargaining agent includes the right to select a representative which has been chosen to represent the employees of the employer in a different bargaining unit."²² But the N.L.R.B., mindful of the increased responsibilities placed upon plant protection employees in wartime, recommended to the national union involved that it sharply delimit the authority of the production workers and security employees bargaining units so that the respective duties of both classes of workers could be performed competently and impartially. Not only did the Board rule that the same national union could represent both ordinary workers and militarized plant protection employees, but the N.L.R.B. further directed that the same local union could legally represent both categories of workers.²³

Under the assumption that this policy interfered with the proper

¹⁶ *In the matter of Bethlehem Steel Corporation*, 45 N.L.R.B. 92 (1942).

¹⁷ See also *In the matter of Cramp Shipbuilding Company*, 46 N.L.R.B. 1186 (1943) where a similar Board ruling was rendered.

¹⁸ *In the matter of United States Electrical Motors, Inc.*, 45 N.L.R.B. 298 (1942).

¹⁹ *In the matter of Bethlehem Steel Corporation*, 46 N.L.R.B. 794 (1943).

²⁰ *In the matter of United States Cartridge Company*, 50 N.L.R.B. 358 (1943). Mills took no part in this case. Reilly and Houston ruled that their reasoning in the *Maryland Drydock* case controlled the instant matter. See pp. 177-180, for an analysis of the *Maryland Drydock* decision.

²¹ *In the matter of E. I. du Pont de Nemours*, 49 N.L.R.B. 1125 (1943). *In the matter of McCormick Works*, 44 N.L.R.B. 1332 (1942).

²² *In the matter of Chrysler Corporation*, *op. cit.*, p. 886.

²³ *In the matter of Foote Brothers Gear and Machine Corporation*, 52 N.L.R.B. 861 (1943). See also *In the matter of Cramp Shipbuilding Company*, 46 N.L.R.B. 115 (1942) in which the Board ruled that the same local union could represent a unit of production workers and a unit of foremen.

execution of plant protection employees' duties, the armed services recommended to the N.L.R.B. that it refrain from certifying security employees' unions which were affiliated with rank-and-file labor organizations. Ranking officers of the Army and the Navy addressed a joint letter to the Chairman of the N.L.R.B. setting forth the position of the services. It was pointed out that militarized security employees must "perform their duties without hesitation or influence by outside organizations and without fear or expectation that their performance of duty will be subject of review by any authorities other than military authorities."²⁴ Though the letter stated that the services recognized the right of the guards to collective bargaining, the Army and Navy were of the opinion that continuation of this policy would injure the domestic security program. But in a case immediately following the declaration of the services' position, the N.L.R.B. generally reaffirmed the former policy.²⁵ However, the Board did sustain the military viewpoint in part and refused to classify militarized guards in the same unit with non-militarized security employees. On this point, the Board stated that it could not "regard the induction of the guards into the [military auxiliaries] as a meaningless act, since it does indicate that such persons from the nature of their oaths then owe allegiance directly to the government as well as to the corporation."²⁶ Beyond this concession, the Board did not grant the armed services' request. Rejecting their position, the N.L.R.B. ruled that militarized guards did not lose their "employee" status under the terms of the Wagner Act, and consequently were entitled to choose any legitimate labor union as their bargaining agent.²⁷ After the *Dravo* case, the Army Service Forces subsequently issued a directive in which the Army's position was reconciled with that of the National Labor Relations Board.²⁸

Court Review of Board Policy

Despite the Army's deference to the Board's position with respect to collective bargaining rights of militarized guards, a federal circuit court ruled that the protection of the Wagner Act was not available to militarized security employees.²⁹ Specifically the Court ruled that militarized guards were not "employees" under the terms of the National Labor Relations Act, and consequently the N.L.R.B. could not direct an employer to bargain with the representatives of their labor organizations. On this

²⁴ "Plant Guards and Bargaining Units," *op. cit.*, p. 940.

²⁵ *In the matter of Dravo Corporation*, 52 N.L.R.B. 322 (1943). ²⁶ *Ibid.*, p. 327.

²⁷ See also *In the matter of Budd Wheel Company*, 52 N.L.R.B. 666 (1943).

²⁸ "N.L.R.B. Asks Rehearing in Plant Guard Cases," *Labor Relations Reporter*, January 15, 1945, vol. 15, p. 598. The directive stated in part as follows: "In the event that plant guards enrolled as Auxiliary Military Police desire to be represented in collective bargaining with management, they should be represented by a collective bargaining unit other than that representing the production and maintenance workers. However, in such event, each bargaining unit may be affiliated with the same trade union local, provided they are, in fact, separate bargaining units."

²⁹ *N.L.R.B. v. E. C. Atkins & Company*, 147 Fed. (2d) 730 (CCA-7, 1945).

score the Court stated that "in our view, the relation which they sustain to the federal government is wholly incompatible with the theory that they are employees of the [company] within the meaning and purposes of the N.L.R.A." In support of the contention that the militarized guards were employees under the terms of the Wagner Act, the Board pointed out that they were paid by the company; that the guards were hired by the employer; that they could be discharged by the corporation; and that the company exercised general control over their terms and conditions of employment. However, the Court rejected the Board's arguments, ruling that the guards were under direct control of the military service and that they were hired and discharged in conformance with the armed forces' recommendations. As for the compensation argument, the Court stated that the government actually paid the guards, though the company acted as its agent. In another case a different circuit court ruled that a bargaining unit composed of militarized plant guards was not appropriate within the meaning of the Wagner Act.³⁰ In contrast to the decision in the *Atkins* case, the Court in the instant case ruled that militarized guards were "employees" under the terms of the National Labor Relations Act. Nonetheless the Court declared that such employees could not constitute a proper unit for purposes of collective bargaining, and accordingly the N.L.R.B. could not lawfully order an employer to bargain with a union representing militarized plant guards.

Both decisions were later appealed by the N.L.R.B. to the Supreme Court of the United States.³¹ While the cases were being appealed, however, the guards involved in the controversy were in the process of being demilitarized.³² Accordingly the Supreme Court remanded both cases to the lower courts for redetermination in view of the demilitarization of the guards.

Notwithstanding the fact of demilitarization, one circuit court ruled that plant protection workers were still not "employees" within the meaning of the Wagner Act.³³ In the other case the lower court again ruled that plant guards, regardless of their demilitarization may not be represented by a rank-and-file labor organization.³⁴ The latter Court, however, did not clearly state what would be the legal status of a plant protection employees' union which was not affiliated with a rank-and-file labor organization. Nonetheless both circuit court decisions precluded the full application of the Wagner Act to plant guard labor organizations. From these considerations it appeared that only the Supreme Court and the Congress could finally determine the extent to which plant protection employees might expect legal protection of their right to collective bargaining.

³⁰ *Supra*, *N.L.R.B. v. Jones and Laughlin Steel Corporation*. ³¹ 65 S. Ct. 1413 (1945).

³² "Unionization of Militarized Guards." *Labor Relations Reporter*, June 11, 1945, vol. 16, p. 484.

³³ *N.L.R.B. v. E. C. Atkins & Company*, 155 Fed. (2d) 567 (CCA-7, 1946).

³⁴ *N.L.R.B. v. Jones and Laughlin Steel Corporation*, 154 Fed. (2d) 932 (CCA-6, 1946).

*Supreme Court Overrules Decisions*³⁵

The Supreme Court overruled the decisions of both lower courts.³⁶ Plant protection employees were demilitarized at the time the Supreme Court reviewed the cases, but the Court dealt with the applicability of the National Labor Relations Act to militarized guards rather than limiting its attention to the status of non-militarized guards. Thus, the legality of bargaining units of both categories of plant security workers was settled. The pronouncements of the Court relating to militarized guards are equally applicable to non-militarized plant protection employees.

In the *Atkins* case, the "employee" status of the militarized guard was dealt with at great length. The high Court decided that the fact of militarization did not destroy the basic employer-employee relationship between management and the plant protection employee. It was pointed out that management, despite the control exercised by the military authorities over the plant guards, still could determine the guards' compensation, hours of work, and other conditions of employment. Recognizing that the hiring and dismissal of these employees was subject to review by the military authorities, the Supreme Court held that power to hire and discharge remained essentially a function of the employer. In deciding that the militarized plant protection worker was an employee for purposes of the National Labor Relations Act, the Court gave great weight to Army Service Forces Circular No. 15, dated March 17, 1943, which in part stated:

Basically the militarization of plant guard forces has not changed the existing systems of hiring, compensation and dismissal; all remain primarily a matter between the guards and plant management. Guards in the employ of a private employer may, as heretofore, be dismissed by that employer.

Since the terms of employment involved negotiations between employers and plant guards, the Court pointed out that the individual security worker, like the single production employee, suffered from inequality of bargaining power. In the absence of collective bargaining, the terms of employment would be determined by the employer alone. Hence, according to the Supreme Court, plant protection employees, like all workers, have a real need for collective bargaining. Neither the nature of their duties, nor their induction into the auxiliaries of the military service, reduced the validity of this consideration.

The Court refused to regard as controlling the argument that unionized plant guards, militarized or non-militarized, might be less loyal to management in the execution of their duties. Neither was much weight given

³⁵ This section was adapted from an article by the writer, published by the Institute of Labor and Industrial Relations of the University of Illinois. See Fred Witney, *Plant-Protection Employees Under Current Federal Labor Legislation*, Institute of Labor and Industrial Relations, University of Illinois, June, 1947.

³⁶ *N.L.R.B. v. E. C. Atkins & Company*, 67 S. Ct. 1265, May 19, 1947. *N.L.R.B. v. Jones and Laughlin Steel Corporation*, 67 S. Ct. 1274, May 19, 1947.

to the contention that labor organizations will make demands upon unionized plant guards or force agreements from management which will decrease the loyalty and the efficiency of the guards. In this respect the Court stated that the process of collective bargaining is "capable of adjustment to accommodate the special functions of plant guards." From this statement it appears that the Court would look with disfavor upon certification of a bargaining agent which interferes with the proper execution of duties by plant guards.

Right to Join Rank-and-File Unions

In the *Jones and Laughlin* case, the high Court dealt with two major problems which were not present in the *Atkins* decision:

- (1) The issue of whether a single labor union could represent both a unit of plant protection employees and a group of production and maintenance workers;
- (2) Application of the National Labor Relations Act to deputized plant protection employees.

The Circuit Court based its decision in the *Jones and Laughlin* case primarily on the fact that the guards were represented by an organization which also had been recognized as the bargaining agent for production employees. The Supreme Court ruled, however, that the N.L.R.B. could properly certify a single labor union as the appropriate bargaining agent for both plant guards and production workers.

A controlling consideration which prompted the Supreme Court's decision on this point involved the official position of the military authorities. The War Department was apparently reconciled to the fact that militarized guards could safely join and bargain through unions representing production workers without decreasing the guards' loyalty to the United States or impairing their ability to perform their military duties effectively. In the light of this consideration, the Court declared that "it is impossible to say that a civilian agency erred in failing to insist upon what the military experts found to be unnecessary."

Another factor which influenced the *Jones and Laughlin* decision was the right of all employees to select bargaining agents of their own choosing. Limitation of this right, according to the Supreme Court, might deprive the plant protection employees of effective collective bargaining. The Court adopted the view that a union representing both plant protection employees and production workers might be the only one willing and able to deal with the employer. It also pointed out that this union's experience and acquaintance with the employer and the plant might make it particularly qualified to bargain for the guards. On this issue, the high Court stated that to prevent security workers "from choosing a union which also represents production and maintenance employees is to make the collective bargaining right of guards distinctly second class."

Deputized Plant Guards

The second problem peculiar to the *Jones and Laughlin* case was the application of the National Labor Relations Act to deputized plant protection employees. After the guards in this case were demilitarized, they were deputized by the police authorities of the City of Cleveland, Ohio. The Supreme Court held that these deputized employees could bargain under the protection of the National Labor Relations Act. Deputized plant protection employees, according to the Court, bear the same fundamental relation to management as do non-deputized guards. In addition, it was pointed out that their connection with civil, police, municipal, or state authorities is not one which is necessarily inconsistent with their status as employees for the purposes of the National Labor Relations Act. Once more the Court refused to give weight to the contention that organized deputized guards might not faithfully or effectively perform their duties and obligations to management or to the public. On this point, the majority of the Court declared that:

If there is any danger that particular guards may not faithfully perform their obligation to the public, the remedy is to be found other than in the wholesale denial to all deputized guards of their statutory right to join unions and to choose freely their bargaining agent. The state and municipal authorities, in short, have adequate means of punishing infidelity and assuring full police protection.

In other words, deputized guards can expect no protection from the National Labor Relations Act if they fail to perform their duties effectively or faithfully. A non-deputized plant protection employee may also be discharged or otherwise disciplined if he neglects his duties or fails to give loyal service to management.

Congressional Action

The Labor-Management Relations Act, 1947,³⁷ nullified in part the ruling of the Supreme Court in the *Jones and Laughlin* case. Under the terms of this Act, a plant guard's union affiliated with a rank-and-file labor organization may not be certified by the National Labor Relations Board. On the other hand, a bargaining unit composed of plant protection employees not associated with a production workers' labor organization may still be certified for the purposes of collective bargaining. Deputized plant guards may bargain under the protection of the N.L.R.B. provided that their unions are not affiliated with rank-and-file labor organizations.

In addition, the Labor-Management Relations Act, 1947, does not prohibit the execution of a collective bargaining agreement between an employer and a plant protection employees' union which is affiliated with a rank-and-file labor organization. Employers remain free to recognize, to bargain collectively, and to execute contracts with such organizations. The

³⁷ Sec. 9(b)(3).

essential feature is that the N.L.R.B. may not order an employer to bargain with a labor organization composed of plant guards which is associated with a production workers' union. Finally, it may be pointed out that the N.L.R.B. may direct the reinstatement of a plant guard if he is discharged because of union activities. Unlike foremen, guards have not lost their employee status under the terms of the Labor-Management Relations Act, 1947.³⁸ A foreman discharged as a result of union activities has no remedy at law, but a plant guard dismissed for the same reason may obtain relief from the N.L.R.B.

Conclusions

Similar to the foremen union problem, the N.L.R.B. during World War II was required to decide whether or not plant guards could organize and bargain collectively under the protection of the National Labor Relations Act. In resolving this question, the Board held that the full protection of the Wagner Act was available to these employees. Not only did the Board certify their unions which were not affiliated with rank-and-file labor organizations, but it also awarded certifications to plant guards' unions which were associated with production workers' labor unions. The Board made no distinction between militarized and non-militarized guards, and certified unions composed of militarized plant guards in the same manner as it certified units containing non-militarized plant protection employees. The Supreme Court of the United States overruled two decisions handed down by circuit courts of appeals and sustained in full the rulings of the National Labor Relations Board. Subsequently, however, the Congress prohibited the certification of plant guards' unions affiliated with production workers' labor organizations.

This action of Congress seriously weakens the bargaining position of plant guards. Forbidden the opportunity to anchor their unions to established rank-and-file labor organizations, plant protection employee unions must weather unsupported the sometimes stormy seas of industrial relations. Nothing during World War II indicates that organized plant protection employees, classified in units separate from production and maintenance workers, affiliated with rank-and-file unions could not perform their plant security duties effectively. Continuation of this limitation on plant protection employee labor organization, in the words of the Supreme Court of the United States, "makes the collective bargaining right of guards distinctly second class."

³⁸ See pp. 195-196, where the effect of the Labor-Management Relations Act, 1947, on foremen's unions is discussed.

Chapter 12

SOLDIER-EMPLOYEE ISSUES

Questions of Representation

Under the terms of the Selective Service Act of 1940¹ workers inducted into the military service retain their status as "employees" within the firm in which they were formerly employed. Accordingly the N.L.R.B. ruled that workers entering the armed forces were employees on military leave. In addition these servicemen were to be considered as part of the bargaining unit of the plant in which they had worked, and were, moreover, entitled to vote in representation elections.² Actually the Board originally permitted servicemen to cast their ballots by mail. This arrangement, of course, greatly implemented their right to vote inasmuch as the soldier-employees were ordinarily located in training camps quite distant from the locations of their civilian employment.

When the voting issue was reviewed after the United States entered the war, however, the N.L.R.B. reversed its former position and ruled that soldier-employees, although still members of the bargaining unit and eligible to vote, could not cast ballots by mail.³ To support the new position, the Board reported that the determination of the results of bargaining elections were often greatly delayed until servicemen returned their ballots. It was pointed out that in many instances a long period elapsed from the time the Board forwarded a ballot to a serviceman until it was executed and returned. Administrative difficulties in providing for absentee balloting increased even more when soldiers were shifted among the various training camps within the country. To the extent that the certification of bargaining agents was postponed because of these administrative obstacles, the possibilities of industrial unrest with ensuing retardation of war production were increased. The Board also reported that actual returns from soldier-employees were comparatively small. In a 1944 case, the N.L.R.B. reaffirmed its mail-voting policy, declaring that the administrative considerations precluding such voting were more valid in 1944 than they were in 1941.⁴ It was noted that many of the servicemen were now scattered in various units of the armed forces throughout the world, and that "it would be virtually impossible to insure a ballot reaching each man and affording him an opportunity to return it by mail to the Regional Director unless a period of about 3 months was established between the date of the Direction [of election] and the final return date."⁵ Postponement of the certification of bargaining agents for a three-month

¹ 54 Stat. 885, September 16, 1940.

² *In the matter of the Cudahy Packing Company*, 29 N.L.R.B. 830 (February 19, 1941).

³ *In the matter of Wilson & Company*, 37 N.L.R.B. 944 (December 24, 1941).

⁴ *In the matter of Mine Safety Appliance Company*, 55 N.L.R.B. 1190 (1944).

⁵ *Ibid.*, p. 1194.

period might have seriously interfered with the manufacture of the implements of war.

Though denying servicemen the right to vote by mail, the N.L.R.B. permitted them to cast ballots if they appeared at the polls. In one instance both the employer and the labor organization involved in a representation dispute stipulated that men in the armed forces should be ineligible to vote in the election. Protecting the soldier-employees' interests in the proceedings, the Board invalidated this arrangement and ruled that employees of the company on military leave may vote, provided they were able to come in person to the polls.⁶ Further affirming the right of soldier-employees to vote in representation elections, the Board directed that this right was not to be denied merely because an employee did not receive the permission of the employer before he voluntarily enlisted.⁷ On this score the N.L.R.B. pointed out that the Service Extension Act of August 18, 1941,⁸ afforded the same re-employment rights to persons who had enlisted in the service subsequent to May 1, 1940, as the Selective Service Act provides to persons inducted into the service under the terms of that law. Accordingly soldier-employees who enlisted after May 1, 1940, were entitled to the full measure of protection and privileges afforded by the National Labor Relations Act.

Some employers contended that employees replacing workers who entered the military service should not be entitled to vote in representation elections. It was argued that such replacements were only "temporary employees," and as such had no rights under the Wagner Act.⁹ However the Board rejected this contention and ruled that replacement employees had a "sufficient interest in the selection of a bargaining representative to entitle them to a voice in the election."¹⁰ It is noteworthy that the New York State Labor Relations Board established a similar policy. Thus the State Board also permitted soldier-employees to vote in representation elections only if they appeared at the polls. On the other hand, the New York Board permitted replacement employees to vote on the ground that a contrary ruling would have denied to such employees even a temporary voice in the selection of a bargaining agent.¹¹ However the N.L.R.B. refused to allow servicemen furloughed to war industries to vote in representation elections. The Board recognized the extremely temporary status of these employees, and pointed out that the possibility of their being discharged from the armed services to take a permanent job in the plant in which they were working was very speculative and remote.¹²

⁶ *In the matter of Rudolph Wurlitzer Company*, 41 N.L.R.B. 1074 (1942).

⁷ *In the matter of Seymour Woolen Mills Company*, 53 N.L.R.B. 321 (1943).

⁸ Public Law 213, 77th Congress, 1st Session.

⁹ *In the matter of Columbia Pictures Corporation*, 38 N.L.R.B. 608 (1942).

¹⁰ *Ibid.*, p. 612.

¹¹ *In the matter of Horn & Hardart Company*, New York State Labor Relations Board, Case No. SE 9782, dated August 27, 1943.

¹² *In the matter of General Motors Corporation*, 62 N.L.R.B. 427 (1945).

Shifting its position once again, the N.L.R.B., in a postwar case, ruled that soldier-employees could again vote by mail in representation elections.¹³ The privilege, however, was extended only after the Board established safeguards surrounding mail balloting. In order to prevent a protracted delay in the certification of bargaining agents, the N.L.R.B. placed a thirty-day limit on the return of the executed ballot. It was further ruled that the Board was to pass on election literature sent by the parties to the representation dispute to the soldier-employees. In this manner it was hoped that these workers would learn the true facts involved in the representation controversy, and that their choice would not be unfairly influenced. It is further significant that in the *South West Pennsylvania Pipe Lines* case, the N.L.R.B. noted that the number of soldier-workers involved was only fifteen and that the employer had obtained the accurate current addresses of all fifteen employees. In a later postwar case, the mail voting privilege, however, was granted to soldier-employees even though their number totaled ninety-five.¹⁴ Neither did the Board refuse to extend the privilege in a case involving approximately 800 servicemen.¹⁵ In addition, when the conditions surrounding mail voting were satisfied, the opportunity was not denied merely because one of the unions to the controversy protested the right of soldier-employees to vote by mail.¹⁶

On the other hand, the opportunity was refused when the parties to the dispute did not present the Board with accurate information as to the current addresses of the servicemen.¹⁷ The N.L.R.B. did not permit soldier-workers to vote where the employer furnished only 123 current addresses of the 223 servicemen involved. It appears that the N.L.R.B. will weigh more heavily the inclusiveness and the accuracy of the data pertaining to the location of the soldier-employees involved in a representation dispute than their actual number. It is noteworthy that neither the Connecticut State Labor Relations Board¹⁸ nor the New York State Labor Relations Board¹⁹ followed the N.L.R.B. example in granting soldier-employees the privilege of voting in representation elections by mail. As there now exists a comparative measure of stability within the armed forces with respect to

¹³ *In the matter of South West Pennsylvania Pipe Lines Company*, 64 N.L.R.B. 1384 (December 13, 1945). ¹⁴ *In the matter of Food Machinery Corporation*, 64 N.L.R.B. 1405 (1945).

¹⁵ *In the matter of Swift and Company*, 68 N.L.R.B. 440 (1946). See also *In the matter of Rockford Metal Products Company*, 66 N.L.R.B. 538 (1946), where soldier-employees number twenty-nine. ¹⁶ *In the matter of Keystone Steel & Wire Company*, 65 N.L.R.B. 274 (1946).

¹⁷ *In the matter of Tennessee Coal, Iron, & Railroad Company*, 65 N.L.R.B. 1416 (1946). See *In the matter of Joseph Bancroft and Sons, Company*, 67 N.L.R.B. 678 (1946) where the Board refused to poll servicemen by mail on the ground that the employer admitted inability to obtain addresses for 100 of the 223 employees in the armed forces. The privilege was also denied *In the matter of Scripto Manufacturing Company*, 67 N.L.R.B. 1078 (1946) because no issue was raised in the hearing of the case regarding mail balloting of employees in the armed forces.

¹⁸ *In the matter of Heslin Dairy Company*, Connecticut State Labor Relations Board, Case No. E 70 (1946).

¹⁹ *In the matter of Staten Amusement Corporation*, New York State Labor Relations Board, Case No. SE 11600 (1946).

movement, it appears unreasonable to deny servicemen the right to the mail-ballot. In order that the principles of the Wagner Act may be effectuated, however, the procedure should not unduly delay bargaining agent certifications. Nor should parties to representation proceedings be given the opportunity to present the issues to servicemen in a manner which does not accurately reflect the true conditions of the controversy.

Though its policy with respect to mail-voting was not uniform throughout the war, the N.L.R.B. consistently held that soldier-employees were part of the bargaining unit. In comparison, it is noted that the Canadian Wartime Labour Relations Board did not so regard Canadian servicemen.²⁰ Because the N.L.R.B. considered soldier-employees as part of the bargaining unit, the Board was able to afford them special privileges with respect to the designation of representatives upon their separation from the armed forces. Ordinarily the Board will not direct a new representation election until at least one year has elapsed from the date of the original certification.²¹ But where it could be shown that a substantial number of servicemen had returned to their civilian employment, the Board was willing to entertain a new representation petition prior to the expiration of a year.²² In this manner, members of the armed forces, who were unable to participate in the selection of representatives, were afforded an opportunity to sustain or to change a bargaining agent chosen in their absence. Similar to this policy, the New York State Labor Relations Board also ruled that certifications made in the absence of soldier-employees were made subject to the return of the servicemen.²³ Both Boards required, however, that a petitioning union demonstrate that servicemen had returned to the bargaining unit in sufficient numbers so as to constitute a substantial percentage of all the workers employed within the unit.²⁴

Even though the N.L.R.B. regarded soldier-employees as part of the bargaining unit, the agency ruled that these workers need not be counted by a labor union in order to establish its majority status.²⁵ A union was only required to show authorization cards of more than half of the workers currently employed, regardless of the number of employees on military leave. A contrary rule, it was pointed out, would place an almost impossible burden on labor organizations and might indefinitely deprive currently employed workers of their collective bargaining rights. In addition, the Board declared that soldier-employees, though technically a part of the bargaining unit, were not presently "concerned in the choice of a

²⁰ "Soldier Ballots in Employee Elections," *Labor Relations Reporter*, November 20, 1944, vol. 15, p. 329. In this respect, the C.W.L.R.B. stated: "the members of the Board recognize their tremendous obligation to those who have enlisted, but . . . we reluctantly come to the conclusion that the members of His Majesty's forces . . . cannot properly be included in the bargaining unit."

²¹ See pp. 139-140 for an analysis of the "one-year rule."

²² *Supra*, In the matter of *Mine Safety Appliance Company*.

²³ *Supra*, In the matter of *Horn & Hardart Company*.

²⁴ See In the matter of *General Fireproofing Company*, 58 N.L.R.B. 1609 (1944).

²⁵ In the matter of *Supersweet Feed Company*, 62 N.L.R.B. 53 (1945).

bargaining agent."²⁶ Accordingly an election was directed where a union showed 57 authorization cards in a unit composed of 103 employees who were actually working even though the employer contended that the unit should be increased by the 95 soldier-workers who were in the armed forces.²⁷ If the Board had upheld the employer's position the union would have been compelled to show the support of at least 100 employees. Under such a rule the employees actually working in the plant could not be afforded the protection of the Wagner Act until the union successfully contacted the soldier-employees who probably were scattered all over the world. As noted, the bargaining agent chosen by those currently employed was subject to redetermination by the servicemen upon their return to civilian employment. The rights of the soldier-employees, therefore, could scarcely be regarded as compromised by this N.L.R.B. policy.

Re-employment Rights of Discriminatorily Discharged Servicemen

Some employees discharged unlawfully by their employers were subsequently inducted into the military service. Under such circumstances the N.L.R.B. ordered their reinstatement upon their discharge from military duty.²⁸ Employers are required to reinstate these soldier-employees whether they were inducted into the service or whether they had voluntarily enlisted. To qualify for reinstatement, however, the employee was originally required to petition his employer for reinstatement within thirty days after his discharge from the armed services. In a later case the period of application was extended to forty days.²⁹ It is noteworthy that the Selective Service Act in comparison allows a veteran sixty days in which to apply for his old civilian job. Similar to the N.L.R.B., the New York State Labor Relations Board also directed employers to reinstate discriminatorily discharged servicemen. However the State Board only permits a veteran thirty days in which to request reinstatement.³⁰

As noted, the N.L.R.B. afforded employees who replaced workers on military leave with the opportunity to vote in bargaining elections. Similarly the Board ordered the reinstatement of a replacement employee who entered the military service subsequent to his being discharged in violation of the Wagner Act. Notwithstanding the objections of some employers, the Board ruled that "anything less than restoration to the job he held prior to the discrimination against him would not effectuate the policies of the Act."³¹ However the Board did sustain in part the argument that replacement workers had no reinstatement rights. In this respect some employers contended that they could not comply with a replacement

²⁶ *Ibid.*, p. 54.

²⁷ *In the matter of Jasper Cabinet Company*, 61 N.L.R.B. 961 (1945).

²⁸ *In the matter of Federbush Company, Inc.*, 34 N.L.R.B. 539 (1941).

²⁹ *In the matter of J. D. Brock Company*, 42 N.L.R.B. 457 (1942).

³⁰ *In the matter of J. S. Krum, Inc.*, New York State Labor Relations Board, Case No. SU 4384 (February 10, 1942).

³¹ *In the matter of Humble Oil & Refining Company*, 48 N.L.R.B. (1943), 1118, 1138.

worker's reinstatement order inasmuch as the Selective Service Act required that employers reinstate the permanent employee to his original job. Consequently a temporary employee, hired to replace the permanent worker, could not at times be reinstated without violation of the Selective Service Act. Recognizing this possible clash of authority, the N.L.R.B. directed that a replacement worker be reinstated only in those instances in which the original employee did not apply for his old job under the terms of the Selective Service Act. However, if the permanent employee requested his job, the replacement employee was to be placed upon a preferential employment list.³²

In accordance with customary policy, the N.L.R.B., in directing the reinstatement of unlawfully discharged soldier-employees, ordinarily directed the employer to award the servicemen back pay.³³ Back pay was due to the discharged worker for the following periods: (1) between the date of his discharge by the employer and the date of his induction, less any net earnings during this period; and (2) between five days after his timely (forty days) application for reinstatement and the date of offer of reinstatement less any net earnings during the period. Accordingly an employer would not be required to award any back pay provided the discharged employee was inducted into the service on the day of his dismissal, and provided the employer rehired the worker within five days after his timely request for reinstatement.³⁴ Nor is an employer required to award back pay during the period in which the soldier-employee is in the armed services.³⁵

Thus the N.L.R.B. implemented servicemen's Wagner Act rights. To strike a balance between the voting privileges of these employees and the effective wartime administration of the Wagner Act, the Board, shortly after Pearl Harbor, ruled that servicemen could only vote in representation elections by appearing at the polls. However, bargaining agent certifications were made subject to the return of the soldier-employees to the bargaining unit. With the cessation of hostilities, the Board extended the mail-balloting opportunity to the soldier-worker. In addition the N.L.R.B. uniformly ordered the reinstatement with back pay of servicemen who were unlawfully discharged from their civilian jobs prior to their induction into the military service.

³² The Board's policy was sustained by a federal circuit court. *Humble Oil & Refining Company v. N.L.R.B.*, 140 Fed. (2d) 777, 780 (CCA-5, 1944). In upholding the N.L.R.B., the Court stated that "the order of the Board takes cognizance of the [Selective Service Act] and does not confer upon [the replacement employee] any rights antagonistic thereto."

³³ *Supra*, in the matter of *J. D. Brock Company*.

³⁴ In contrast, the New York State Labor Relations Board does not allow the five-day grace period. Under the rules of the State Board, back pay begins to accrue from the date the employee makes his timely request for reinstatement. See *supra*, in the matter of *J. S. Krum, Inc.*

³⁵ In the matter of *Baltimore Transit Company*, 47 N.L.R.B. 109 (1943). A union in this case claimed an employee's induction into the armed services was caused by the discharge as he thereby lost his occupational deferment status. Consequently, the labor union urged that the employer was liable for back pay during the employee's tour of military duty. But the Board rejected the union's position, ruling that the connection between discharge and induction was "speculative and remote."

VIOLETIONS OF THE WAGNER ACT

Unfair Labor Practices

The World War II pattern of unfair labor practices closely followed the prewar model.¹ Even though the comparative importance of unfair labor practice cases sharply decreased during the war period,² many employers continued to engage in prewar activities designed to interfere with their employees' right to self-organization and collective bargaining. Some employers persisted in interfering with this right by threatening union members with economic reprisals;³ by engaging in industrial espionage;⁴ and by interrogating employees as to their union activities.⁵ However, cruder types of coercion, such as murders, beatings, and sluggings of union organizers occurred less frequently.⁶ With respect to company domination of labor unions, the National Labor Relations Board reports that employers still contributed financial aid to trade unions, and otherwise interfered with their formation and organization.⁷ Employers continued to foster unlawful employee representation plans;⁸ to encourage supervisors to form inside unions in order to forestall the organization of their employees by nationally affiliated labor unions;⁹ and to afford special privileges to company-favored unions.¹⁰

Many of the discrimination cases decided by the N.L.R.B. in the war period involved the application of prewar principles. The Board continued to hold that employers violated the Wagner Act by discharging employees for union activities;¹¹ by demoting them to less attractive jobs;¹² and by depriving them of bonuses¹³ or seniority rights.¹⁴ Not only were wartime workers guaranteed the right to join and retain membership in legitimate labor unions,¹⁵ but the Board also extended the protection of the Wagner Act to employees who engaged in other union activities. As in prewar years, workers could, under Wagner Act protection, circulate

¹ National Labor Relations Act, 49 Stat. 449, Sec. 8 provided that an employer engaged in an unfair labor practice if he (1) interfered with the right of employees to self-organization; (2) dominated or interfered with the formation or administration of any labor organization, (3) discriminated in regard to hire or conditions of employment to encourage or discourage membership in any trade union; (4) discharged or otherwise discriminated against an employee because he has filed a charge or given testimony under the Act; and (5) refused to bargain collectively with representatives of certified unions.

² See p. 24

³ National Labor Relations Board, *Ninth Annual Report* (1944), p. 36.

⁴ National Labor Relations Board, *Seventh Annual Report* (1942), p. 43.

⁵ National Labor Relations Board, *Eighth Annual Report* (1943), p. 28.

⁶ National Labor Relations Board, *Seventh Annual Report* (1942), p. 42.

⁷ National Labor Relations Board, *Tenth Annual Report* (1945), p. 39.

⁸ *In the matter of Standard Oil Company of California*, 61 N.L.R.B. 1251 (1945).

⁹ *In the matter of Kinner Motors, Inc.*, 57 N.L.R.B. 622 (1944).

¹⁰ *In the matter of W. E. Horne Engineering Company*, 61 N.L.R.B. 742 (1945).

¹¹ *In the matter of Birdsboro Steel Foundry and Machine Company*, 54 N.L.R.B. 1274 (1944).

¹² *In the matter of the Alexander Milburn Company*, 62 N.L.R.B. 482 (1945).

¹³ *In the matter of Young Engineering Company*, 57 N.L.R.B. 1221 (1944).

¹⁴ *In the matter of Reliance Manufacturing Company*, 60 N.L.R.B. 946 (1945).

¹⁵ National Labor Relations Board, *Ninth Annual Report* (1944), p. 41.

petitions for wage increases;¹⁶ solicit members for their unions on company property, as long as such activities did not interfere with production;¹⁷ or act as spokesmen for fellow employees in expressing dissatisfaction with work schedules.¹⁸ On the other hand, the National Labor Relations Board continued to administer the Wagner Act so as to avoid any interference with "the normal exercise by an employer of his right to select, dismiss, demote, transfer, or otherwise affect the hire or tenure of employees, or the terms or conditions of their employment, for reasons not forbidden by the Act."¹⁹

As in previous years, the Board discovered few violations of the section of the Wagner Act which prohibits employers from discharging or otherwise discriminating against an employee because he filed an unfair labor practice charge or testified in a Board hearing.²⁰ However the N.L.R.B. continued to find many violations involving employers' refusal to bargain collectively with the representatives of N.L.R.B. certified labor unions. Some employers persisted in ignoring proper union requests to bargain;²¹ in refusing to recognize the certified union as the bargaining agent for non-member employees included in the appropriate unit;²² and in refusing to bargain in good faith.²³ Similarly the Board uniformly ruled a violation where employers refused to embody in a written contract oral agreements reached between management and labor unions.²⁴ On the other hand, the Board, as always, held that an employer who had bargained in good faith was not required to continue negotiations if an impasse had been reached.²⁵

Many of the unfair labor practice matters arising under the Wagner Act during the war years were, therefore, not substantially different in character than those of the prewar period. In some instances, however, these cases possessed a distinct wartime flavor. A violation of the National

¹⁶ *In the matter of Rockingham Poultry Marketing Cooperative, Inc.*, 59 N.L.R.B. 486 (1944).

¹⁷ *In the matter of William Davies Company*, 37 N.L.R.B. 631 (1941). See *infra*, pp. 225-227, for a further treatment of the union-activity and company-property relationship.

¹⁸ *In the matter of Texas Textile Mills*, 58 N.L.R.B. 352 (1944).

¹⁹ National Labor Relations Board, *Tenth Annual Report* (1945), p. 40.

²⁰ *Ibid.*, p. 45.

²¹ *In the matter of Twin City Milk Producers Association*, 61 N.L.R.B. 69 (1945). In this case, the Board, in accordance with established principles, held that a telegram sent by the union to the employer constituted proper notice to negotiate.

²² *In the matter of U.S. Automatic Corporation*, 57 N.L.R.B. 124 (1944). As the Wagner Act provided that the certified union shall be the exclusive bargaining agent for all employees within the unit, an employer must recognize such labor organization as the representative of non-members as well as union members.

²³ *Supra*, *In the matter of Twin City Milk Producers Association*. Here the employer only went through the motions of collective bargaining without attempting to reach a common agreement with respect to conditions of work.

²⁴ *In the matter of American Creosoting Company, Inc.*, 46 N.L.R.B. 240 (1942). See *H. J. Heins Company v. N.L.R.B.*, 311 U.S. 514 (1941) in which the Supreme Court sustained this policy. Under the terms of the Labor-Management Relations Act, 1947, Sec. 8(d), the execution of a written contract incorporating any agreement achieved through collective bargaining is required if requested either by representatives of labor or of management.

²⁵ *In the matter of Montgomery Ward & Company*, 39 N.L.R.B. 229 (1942). It had long been established that the National Labor Relations Act does not require that an agreement over conditions of work be ultimately reached by the negotiating parties.

Labor Relations Act was found where an employer posted notices throughout his plant suggesting that union organizers were a group of "intimidators" and threatened the "substitution of Naziism for Americanism."²⁶ Neither was an employer permitted to assert that a union was "backed by Germans" where the intent was to discourage unlawfully membership in the organization.²⁷ A supervisor implicated his employer in an unfair labor practice by intimating that the company would not ask for occupational army service deferment for an employee if the worker persisted in union activities.²⁸ Employers were not permitted to distribute "I am an American" buttons to their employees not wearing union buttons. The obvious inference that union members were not Americans evidently prompted the Board's decision.²⁹ Effecting the arrest of persons distributing union literature in a plant was deemed unlawful, even though the employer urged that the plant was engaged in secret war work, and that the persons jailed might have been spies and saboteurs. It was noted that a labor union was organizing the plant's workers when the employer procured the arrest.³⁰ Neither did the Board sustain the argument that employers could engage in unfair labor practices with impunity because the company was producing materials for the exclusive use by the government.³¹ The N.L.R.B. further ruled that an employer engaged in an unfair labor practice when he appealed to his workers' patriotism to defeat a union in a bargaining election by drawing a contrast between the hardships endured by men in the armed forces with the attempts being made by the employees to better their economic position through organization.³² Apparently the employer neglected to mention that any improved economic status of his workers would not be obtained at the expense of the servicemen, but would, perhaps, result in less company wartime profits. On the other hand the Board found no violation of the Wagner Act where union members were discharged because they had violated a Federal Bureau of Investigation domestic security measure. These employees were not permitted to utilize their union status as a bar to dismissal.³³

Wartime Wage Adjustments

During the war period the N.L.R.B. discovered another important violation of the Wagner Act of a distinct wartime character. As noted, under the terms of the Act of October 2, 1942,³⁴ wartime wage increases were prohibited unless approved by the National War Labor Board. Con-

²⁶ *In the matter of Rieke Metal Products Company*, 40 N.L.R.B. (1942), 867, 872.

²⁷ *In the matter of Fred A. Snow & Company*, 41 N.L.R.B. (1942), 1288, 1292.

²⁸ *In the matter of Western Cartridge Company*, 43 N.L.R.B. 179 (1942).

²⁹ *In the matter of American Laundry Machinery Company*, 45 N.L.R.B. 355 (1942).

³⁰ *In the matter of Spalek Engineering Company*, 45 N.L.R.B. 1272 (1942).

³¹ *In the matter of National Tool Company*, 48 N.L.R.B. 1254 (1943).

³² *In the matter of J. L. Brandeis and Sons*, 54 N.L.R.B. 880 (1944).

³³ *Supra*, *In the matter of American Laundry Machinery Company*

³⁴ See *supra*, chap. 4.

sequently one of the most effective appeals which a trade union can make to maintain its membership was impaired for the duration of the war. To compensate in part for this wartime condition, the N.W.L.B. refused to process an employer's unilateral application for a wage increase where a duly certified labor union represented his employees.³⁵ Furthermore the N.L.R.B. ruled that an employer violated the Wagner Act if he refused to consult with the representatives of his employees' labor organization before filing a wage increase application with the National War Labor Board.³⁶

A typical case involved a large St. Louis department store. A small trade union representing only forty of the firm's 4500 workers was certified by the National Labor Relations Board. Without negotiating with the union, the company petitioned the N.W.L.B. for a wage increase for all its employees, including the forty union members. In ruling that the company engaged in an unfair labor practice by side-stepping the union, the N.L.R.B. pointed out that the employer's action tended to destroy the small labor organization. If the union accepted the wage increase about which the company refused to bargain, the organization would, in effect, admit that it had little justification for existence. On the other hand, if the union refused to accept the increase its members would probably withdraw from the union in order to enjoy the better wages. In either case, the Board declared that the employer's refusal to bargain collectively seriously interfered with the labor union's wartime status.

The Board's decision in the *Famous-Barr* case conformed to prewar Board principles. Long before World War II the agency ruled that unfair utilization by employers of their power to adjust wage rates constituted a violation of the Wagner Act. An employer may not award a wage increase to a group of unorganized employees and refuse to grant the same raise to his organized workers.³⁷ Neither may a company induce an employee to resign from a union by suggesting that he engage in individual bargaining and then immediately award him a wage increase.³⁸ Similarly the granting of wage increases to employees to persuade them not to join labor organizations has always been deemed an unfair labor practice.³⁹ Employers who attempt to influence the outcome of representation elections also violate the National Labor Relations Act. In one such instance an employer delayed the posting of a notice of a wage increase until the

³⁵ National War Labor Board, *Rules of Organizational Procedure* (March, 1945), p. 27.

³⁶ *In the matter of Famous-Barr Company*, 53 N.L.R.B. 1366 (1943). The Board's decision was sustained by the Supreme Court of the United States. *Famous-Barr Company v. N.L.R.B.*, 326 U.S. 376 (1945); Rehearing denied 66 S. Ct. 468.

³⁷ *In the matter of Appalachian Electric Power Company*, 47 N.L.R.B. 821 (1943).

³⁸ *In the matter of Leyse Aluminum Company*, 37 N.L.R.B. 839 (1941).

³⁹ *In the matter of Wright Products, Inc.*, 45 N.L.R.B. 509 (1942); *In the matter of Phillips Petroleum Company*, 45 N.L.R.B. 1318 (1942).

day on which the Board directed an election. As the employer could offer no reasonable explanation for the coincidence, the Board found an unfair labor practice.⁴⁰ Neither may an employer promise an increase in wages on the condition that a labor union be defeated in an N.L.R.B. election.⁴¹

As noted, the power of employers to adjust wage rates during the war period was limited. Accordingly they could no longer grant pay increases to influence the outcome of representation elections. Some firms, however, attempted to accommodate this device to war conditions by requesting the National War Labor Board for a wage increase just prior to a representation election. By this method some employers hoped that a wage increase could be obtained, and that the raise would influence workers' votes in the bargaining election. But the National War Labor Board in part blocked this tactical move by refusing to process wage increase petitions in cases where the N.L.R.B. had already directed a bargaining election.⁴² If the N.W.L.B. had established a contrary rule, the agency would have been in effect a party to a Wagner Act unfair labor practice. Accordingly the N.W.L.B. withheld decisions with respect to wage increase applications where the N.L.R.B. had ordered bargaining elections. In support of this position, the N.W.L.B. pointed out that the N.L.R.B. had held that wage increases granted on the eve of an election constituted a violation of the National Labor Relations Act; consequently the N.W.L.B. ruled that it would not authorize that which the N.L.R.B. had deemed unlawful.⁴³ To implement this policy the N.L.R.B. kept the N.W.L.B. informed of all pending representation elections.⁴⁴

Though employer applications for wage increases were not processed in those cases in which bargaining elections were directed, the N.W.L.B. entertained these petitions where the N.L.R.B. had not specifically ordered elections. The N.W.L.B. did not refuse to process wage increase applications merely because a labor organization had filed a certification

⁴⁰ *In the matter of Joseph L. Fradkin*, 45 N.L.R.B. 902 (1942).

⁴¹ *In the matter of Whiterock Quarries*, 45 N.L.R.B. 165 (1942); see also *In the matter of Ohio Tool Company*, 47 N.L.R.B. 1366 (1943); other types of economic interference with elections ruled as unfair labor practices include the offering of free movie tickets to employees on the night of the election. *In the matter of Taitel & Son*, 45 N.L.R.B. 551 (1942).

⁴² National War Labor Board, *op. cit.*, p. 28. Specifically, the National War Labor Board provided that "no action shall . . . be taken by the Regional Board on any application after the National Labor Relations Board or a similar state agency has ordered the holding of an election to determine the status of a labor organization as the collective bargaining agent of any of the employees involved in the application."

⁴³ *In re Western Cartridge Company*, 6 War Labor Reports 17 (1943).

⁴⁴ E. B. McNatt, former Director of the Wage Stabilization Division of the Sixth Regional War Labor Board, described the procedure adopted by his office to implement the policy. He stated that the Chicago and St. Louis Regional Offices of the National Labor Relations Board forwarded to his office each Monday a list of all pending elections which were to take place during the week. Upon the receipt of the weekly list, which often was very long, his staff scrutinized the information to determine whether any of the directed elections affected companies which had submitted applications for wage increases. Where such a situation occurred, the wage application was placed in a suspense file until the bargaining election was held. It is reported that this procedure was later generally adopted by all the other Regional War Labor Boards.

petition with the National Labor Relations Board. On this point the N.W.L.B. ruled that its "practice has been . . . not to regard the pendency of a petition for election as grounds for postponing the processing of an application unless a date for an election has actually been set by the N.L.R.B."⁴⁵ Neither did the N.W.L.B. delay the processing of wage increase petitions where labor unions had been defeated in bargaining elections.⁴⁶ These applications were processed regardless of whether or not unions claimed employer interference with representation elections. However any subsequent pay raise authorized under such circumstances was awarded without prejudice to the unions' right to allege an unfair labor practice in a subsequent N.L.R.B. proceeding.

Despite the efforts which the N.W.L.B. made to withhold decisions on wage issues when bargaining elections were pending, the N.L.R.B. invalidated several elections because of premature announcements of pay increases. In one typical case an A.F.L. affiliate learned that the N.W.L.B. had granted a wage increase affecting the employees of the plant. The wage application was previously jointly submitted by the employer and the A.F.L. union. Just prior to a representation election in which the A.F.L. union was one of the contestants, the organization's officials spread the information of the wage increase among the plant's employees in an attempt to influence the vote. Upon learning of the A.F.L. union's action, the N.W.L.B. rescinded the wage increase. Nevertheless the N.L.R.B. set aside the election on the ground that the conduct of the A.F.L. local unlawfully affected its results.⁴⁷ In a similar case an independent union on the eve of a representation election revealed a War Labor Board wage increase which that Board had prematurely released. Even though the wage order was again rescinded, the N.L.R.B. declared that "in the . . . period of fixed wage ceilings, with resultant limitations imposed upon one of the most effective appeals a labor organization can make to employees during an organizing campaign . . . the announcement indicating the approval of the joint wage increase application of the Independent and the company, prevented a free choice by the employees."⁴⁸ Another employer violated the Wagner Act by posting a notice stating that he would hold in trust the money of a wage increase granted his employees prior to a representation election pending the outcome of a wage application.⁴⁹

⁴⁵ *Sixth Regional War Labor Board Manual*, "Report to the N.W.L.B. on Conferences with Messrs. Millis, Reilly, Houston of the N.L.R.B.," p. 3. ⁴⁶ *Ibid.*, p. 4.

⁴⁷ *In the matter of Seneca-Knitting Mills*, 59 N.L.R.B. 754 (1944).

⁴⁸ *In the matter of Continental Oil Company*, 58 N.L.R.B. (1944), 169, 172.

⁴⁹ *In the matter of Kaplan Brothers*, 49 N.L.R.B. (1943), 1036, 1039. Here the employer unlawfully posted the following notice: "To our employees: A wage increase was promised you some weeks ago. However, yesterday the W.L.B. advised us that a complaint had been filed charging us with violating the Wage Stabilization Act in making the promise to increase wages. We are immediately making application for approval of the promised wage increases. In the meantime, the increase promised you will be set aside to your credit each week and will be given you in a lump sum as soon as it is approved by the W.L.B."

Union Activities on Employer Property

Some leading unfair labor practice issues which developed during the war period did not necessarily spring from wartime conditions.⁵⁰ One of these questions involved the extent to which employees could lawfully engage in union activities on company property. Involved in the controversy is the right of employers to control the use of their property, and the statutory limitation forbidding employers from interfering with employees' legitimate trade union activities. To strike a balance between these conflicting considerations, the N.L.R.B. ruled that employees could not engage in union activities on company property where the effect of their conduct interfered with production or impaired plant discipline.⁵¹ Accordingly an employer's rule restricting the movements of employees between departments in a plant and limiting their speechmaking was declared a valid exercise of employer's control over his property.⁵² It was proved that these employee activities caused a substantial increase in visiting and congregating with the result of decreasing production and breaking down company discipline. It was also lawful for an employer, acting in the interest of cleanliness, to prohibit the distribution of union literature within the plant during the hours of production.⁵³ Neither did the Board find a violation of the Wagner Act where an employer prohibited his employees from engaging in union activities during working hours.⁵⁴ An employee could be legally discharged for distributing union literature on company time.⁵⁵ Similarly an employer was permitted to discharge a worker because he had solicited union members during working hours.⁵⁶ In establishing the principle that working time is for work only and not a proper period for union activities, the N.L.R.B. declared that "an employer may promulgate and enforce a rule prohibiting union activity during working hours in places where work is being performed in order to insure continuous production during working hours."⁵⁷

On the other hand, the Board extended the protection of the Wagner Act to employees engaging in union activities on company property where such conduct neither impaired production nor weakened plant discipline.⁵⁸ An employer may not discharge an employee for soliciting union members on his own time, even though he engages in these activities on company

⁵⁰ Such issues included the following: (1) private property and union activities; (2) employer electioneering; and (3) adjustment of grievances. These problems are treated in subsequent pages.

⁵¹ *In the matter of William Davies Company*, 37 N.L.R.B. 631 (1941).

⁵² *In the matter of Shinkle Shoe Company*, 54 N.L.R.B. 189 (1943).

⁵³ *In the matter of Goodyear Aircraft Corporation*, 57 N.L.R.B. 502 (1944).

⁵⁴ *In the matter of Scullion Steel Company*, 49 N.L.R.B. 405 (1943).

⁵⁵ *Supra*, *In the matter of Goodyear Aircraft Corporation*.

⁵⁶ *In the matter of Wennonah Cotton Mills Company*, 63 N.L.R.B. 143 (1945). See also *In the matter of Dallas Tank & Welding Company*, 51 N.L.R.B. 1315 (1943).

⁵⁷ *In the matter of Carter Carburetor Corporation*, 48 N.L.R.B. (1943), 354, 355.

⁵⁸ It is noteworthy that the N.W.L.B. established a similar rule. *In re Allied Chemical and Dye Corporation*, 7 War Labor Reports 227 (1943).

property.⁵⁹ In this connection the Board stated that "a rule prohibiting union activity on company property outside of working time constitutes an unreasonable impediment to self-organization and that discharges for violation thereof are discriminatory."⁶⁰ It appears, therefore, that the control of an employer over his private property is limited to the extent that his employees engage in union activities on his property outside of working hours.⁶¹ In another leading case the N.L.R.B. ruled that employees could lawfully distribute union literature outside a plant, though on company property.⁶² To implement this policy, workers discharged for engaging in such union activities were ordered reinstated with back pay.⁶³

Employees, moreover, were permitted to wear union buttons⁶⁴ and union caps⁶⁵ during working hours and on company property. It was held that the wearing of such union insignia did not materially interfere with production or impair plant discipline.⁶⁶ A company rule prohibiting collections of any sort on company property at any time was also deemed illegal because the rule applied equally to non-working hours as well as to company time.⁶⁷ Nor could employers institute and enforce rules which prohibited employees from "talking union" during their free time.⁶⁸ Notwithstanding wartime conditions an employer was directed to permit union officials to board company ships in order to collect dues, distribute union papers, and discuss and present employee grievances.⁶⁹ On the other hand the Board sustained the right of an employer to prohibit employees from soliciting union members outside of working hours where such activities were performed on the selling floors of a large department store.⁷⁰ It was

⁵⁹ *In the matter of Republic Aviation Corporation*, 51 N.L.R.B. 1186 (1943).

⁶⁰ *Ibid.*, p. 1187.

⁶¹ This policy was sustained by the Supreme Court of the United States in *Republic Aviation Corporation v. N.L.R.B.*, 324 U.S. (1945), 793, 803. In its decision, the Supreme Court affirmed that "time outside working hours, whether before or afterward, or during luncheon or rest period, is on employees' time. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization."

⁶² *In the matter of LeTourneau Company of Georgia*, 54 N.L.R.B. 1253 (1944). In reaching its decision, the N.L.R.B. took notice of the fact that the plant in question was located in the heart of a 6000 acre plot of land owned by the company. The gate leading to the public highway was set back 100 feet from the road. It was further noted that employees passing through the gate entered automobiles and were out of reach before they had left company property. The Supreme Court of the United States also took note of the special circumstances of the case and ruled that the company's no-distribution rule destroyed an avenue of communication required for effective organization. See 324 U.S. 793 (1945).

⁶³ *In the matter of Peyton Packing Company*, 49 N.L.R.B. 828 (1943).

⁶⁴ *Supra*, *In the matter of Republic Aviation Corporation*.

⁶⁵ *In the matter of Agar Packing & Provision Corporation*, 58 N.L.R.B. 738 (1944).

⁶⁶ However, Reilly dissented from the majority in declaring that employers had the right to discharge employees wearing union hats. He believed that the hats constituted a "conspicuous sign" *Ibid.*, p. 748.

⁶⁷ *In the matter of Illinois Tool Works*, 61 N.L.R.B. 1129 (1945).

⁶⁸ *In the matter of Fairmount Creamery Company*, 51 N.L.R.B. 651 (1943), enforced 144 Fed. (2d) 128 (CCA-10, 1944); *In the matter of Simmons Company*, 54 N.L.R.B. 130 (1943).

⁶⁹ *In the matter of Richfield Oil Corporation*, 49 N.L.R.B. 593 (1943).

⁷⁰ *In the matter of Famous-Barr Company*, 59 N.L.R.B. (1945), 976, 981. The Board recognized the "unique manner in which the [department store] conducts its operations." When the Supreme Court of the United States reviewed the case, the Court held, however, that the department store involved could not prohibit union solicitation on company premises other than the selling floors. See, *May Department Stores, Inc. v. N.L.R.B.*, U.S. Supreme Court Docket No. 262, certiorari denied October 14, 1946.

believed that such solicitations would interfere with the normal store activities.

The N.L.R.B., with the approval of the Supreme Court, limited the control of an employer over the operation of his plant. A company is not permitted to promulgate and enforce rules which prohibit workers from engaging in union activities on plant property unless such conduct interferes with production or impairs plant discipline. In general, organized workers can solicit fellow employees, make collections, and "talk union" outside of working time. Where, however, employees engage in these activities during working hours, the N.L.R.B. will not ordinarily extend to them the protection afforded by the Wagner Act.

Employer Electioneering

As indicated, cruder forms of employer interference, such as murders, beatings, and sluggings of union organizers occurred less frequently during the war years. Some employers, however, resorted to a less obvious form of interference to forestall collective bargaining. Some employers apparently attempted to accomplish this objective by influencing their employees' vote in representation elections.⁷¹ Ordinarily a labor union will not be certified by the N.L.R.B. unless it receives a majority of all votes cast in a bargaining election.⁷² Consequently employers who seek to undermine a labor union's bargaining position might accomplish their purpose by utilizing their superior economic status in order to defeat the organization at the polls. Moreover, if a company approves of one union, the employer could materially aid the favored labor organization by admonishing his employees to refrain from voting for rival trade unions.

Despite the protection afforded by the Wagner Act, one might expect employees to be influenced by the expressions of their employers. On this point the N.L.R.B. pointed out that employers' anti-union statements "naturally and inevitably [tend] to engender in employees a fear for their economic security should they seek to exercise the right to select representatives of their own choosing."⁷³ Accordingly the Board consistently has held that employers violated the Wagner Act where they made utterances that contained inherent coercive elements. Statements which embodied actual, implied, or veiled threats of economic reprisals were uniformly deemed unlawful.⁷⁴ Under the assumption that employers should maintain a neutral attitude with respect to their employees' choice of bargaining representatives, the Board, in a prewar case, further ruled that an employer may not even instruct his workers as to the administration of representation elections. In this connection it was pointed out that

⁷¹ The bargaining election ballot provides the opportunity for workers to repudiate all or any of the competing unions. See National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, July 12, 1944, p. 17. ⁷² *Ibid.*, p. 20.

⁷³ *In the matter of Pick Manufacturing Company*, 35 N.L.R.B. (1941), 1334, 1350.

⁷⁴ National Labor Relations Board, *Tenth Annual Report* (1945), p. 37.

"the holding by an employer of meetings of employees merely to advise employees of the time and place of an election, to instruct them how they may express their choice, and to advise them to vote . . . might not be unreasonably construed by employees as indicative of opposition to collective bargaining."⁷⁵ It is extremely noteworthy that the N.L.R.B. therein indicated that a violation of the Wagner Act might be found even though the remarks uttered by an employer with respect to a bargaining election were not inherently threatening or coercive.

Abridgment of the right of employers to express themselves involves the constitutional guarantee of free speech and free press. To justify the restriction of the employers' right to free speech, the Board declared: "Freedom of speech is a qualified, not an absolute right. The Act requires the employer to refrain from acts that interfere with, restrain, or coerce employees in the exercise of their rights to self-organization and collective bargaining. The guarantee of such rights to the employees would indeed be wholly ineffective if the employer, under the guise of exercising his constitutional right of free speech, were free to coerce them into refraining from exercising the rights vouchsafed them in the Act."⁷⁶ The Board established the policy that an employer may be restrained from uttering expressions which tended to deny to his employees their rights under the Wagner Act. Perhaps no great objections to the doctrine could be raised where remarks embody crude elements of economic threats or reprisal. On the other hand, the problem becomes more delicate in those instances in which an employer's statements in themselves are non-coercive and otherwise temperate.

In part, the problem was resolved by the Supreme Court of the United States. The high Court declared that employers may express themselves with respect to bargaining elections provided their remarks were of a non-coercive character. On this point the Court stated that "the employer . . . is as free now as ever to take any side he may choose on this controversial issue."⁷⁷ In the light of this ruling, it appears that the Board may not prohibit employers' statements unless they are intrinsically coercive. Consequently, the policy indicated in the *Eagle & Phenix Mills* case⁷⁸ could not stand. Apparently an employer at least has the right to instruct his employees as to the techniques of a bargaining election. In a later case the Supreme Court further limited the power of the Board with respect to the degree to which it might circumscribe employers' expressions. The N.L.R.B. had found an unfair labor practice where an employer, on the eve of a bargaining election, attempted to instill a ma-

⁷⁵ *In the matter of Eagle & Phenix Mills Company*, 11 N.L.R.B. (1939), 361, 369.

⁷⁶ *In the matter of Ford Motor Company*, 14 N.L.R.B. (1939), 346, 379.

⁷⁷ *N.L.R.B. v. Virginia Electric and Power Company*, 314 U.S. (1941), 469, 477.

⁷⁸ See *supra*, n. 75.

terial doubt in the minds of his employees concerning the advantages of selecting either of two unions which were involved in the proceedings. In reversing the Board's decision, the Supreme Court held that no violation of the Wagner Act had occurred. Specifically, the high Court ruled that the employer's words contained no elements suggesting economic reprisal against those workers who differed from the view of the company and as such the expressions were privileged under the constitution.⁷⁹

On the other hand the Supreme Court ruled that an employer violates the Wagner Act when he utters non-threatening statements in a context of general anti-union activities. In this connection, the Court stated that "conduct, though evidenced in part by speech, may amount, in connection with other circumstances, to coercion within the meaning of the Act. If the total activities of an employer restrain or coerce his employees in their free choice, then those employees are entitled to the protection of the Act. And in determining whether a course of conduct amounts to restraint or coercion, pressure exerted vocally by the employer may no more be disregarded than pressure exerted in other ways."⁸⁰ Accordingly the N.L.R.B. ruled that a letter addressed by a company to its workers violated the Wagner Act even though the letter itself was inoffensive. It was pointed out that in the light of the employer's general anti-union conduct, the letter constituted a veiled warning that existing employee benefits would be jeopardized if the union was victorious in a bargaining election.⁸¹ Other apparently temperate and inoffensive letters and speeches were deemed illegal when they were considered as part of a general anti-union campaign.⁸² In still another case a federal court sustained the N.L.R.B. when it ruled that an employer engaged in an unfair labor practice by inserting an advertisement in a daily newspaper just prior to a bargaining election. The advertisement warned employees against being misled into voting for the union. It was noted by the Court that the employer was otherwise unfairly attempting to defeat the union at the polls.⁸³

In line with the *Virginia Electric and Power Company* doctrine, the Board reaffirmed its policy of finding violations where statements in them-

⁷⁹ *N.L.R.B. v. American Tube Bending Company*, 320 U.S. 768 (1943). Specifically, the President of the company made the following remarks to his employees concerning the next day's election: "You have to ask yourself why it is that total strangers all of a sudden became so interested in your welfare? Who are they? And what have they done? And what more can they do for you than you have already done for yourself? You have to ask yourself whether the management of the company that built this factory, that bought material, that bought machinery and that provided these jobs, you have to ask yourself, I say, whether or not this management is best for you in the long run. You have to decide whether your interests and the company's are the same, or whether your interests and those of either union are the same. In other words, fellows, it boils down to this. Is your status under my leadership something that you can improve by choosing someone else for your leader?"

⁸⁰ *N.L.R.B. v. Virginia Electric and Power Company*, p. 477.

⁸¹ *In the matter of Peter J. Schweitzer*, 54 N.L.R.B. 813 (1944).

⁸² *In the matter of Big Lake Oil Company*, 56 N.L.R.B. 684 (1944); *In the matter of Mississippi Valley Structural Steel Company*, 56 N.L.R.B. 485 (1944); *In the Matter of Van Realte Company*, 55 N.L.R.B. 146 (1944); *In the matter of R. R. Donnelley & Sons*, 60 N.L.R.B. 635 (1945).

⁸³ *N.L.R.B. v. Reliance Manufacturing Company*, 143 Fed. (2d) 193 (CCA-7, 1944).

selves were coercive.⁸⁴ One case involved a letter sent by an employer to former workers who were in the military service. When the letter was mailed to the servicemen, attempts were being made to organize the plant's employees. The letter in part stated that the company did not agree "with the boys doing this organizing."⁸⁵ It further declared that the organizers were "two-timers"; that if the writer [vice-president of the company] could, he would "lick the living hell out of them"; that "two big fat organizers are on the job" who are "interested in the \$2.00 or \$5.00 per head they get"; that the writer hoped that Green of the A.F.L. and Lewis of the C.I.O. would "roast in hell forever and a day"; and that the union organizers were "sowing seeds of dissension" and taking advantage of "you boys in the service while you are away." Finally, the writer requested the servicemen to write him about how they felt about the organization campaign. When some of the employees of the company later filed an unfair labor charge, the Board ruled that the letter constituted a violation of the Wagner Act, and that the statements contained in the communication were not privileged under the constitutional guarantee of free speech. In other decisions, however, the Board, in the light of the Supreme Court doctrine, extended the permissible area of employers' activities with respect to representation issues. No violation of the Wagner Act was found even though an employer expressed his preference for operating without a union contract and pointed "to the futility of selecting a union in wartime when the Union would be unable to obtain greater benefits than had already been granted by the company without the assistance of 'total strangers'."⁸⁶

The Labor-Management Relations Act, 1947, adopted at least a portion of the doctrine contained in the *Virginia Electric and Power Company* and in the *American Tube Bending* cases.⁸⁷ Under its terms, an employer may not be charged with an unfair labor practice because of the expressing of any views dealing with bargaining elections or with other matters involving labor organization activities, provided such expression contains no threat of reprisal or force or promise of benefit. The 1947 labor law,

⁸⁴ *In the matter of Shartle Brothers Machine Company*, 60 N.L.R.B. 533 (1945); *In the matter of Ridge Tool Company*, 58 N.L.R.B. 1095 (1944); *In the matter of Comas Manufacturing Company*, 59 N.L.R.B. 208 (1944).

⁸⁵ *In the matter of Shartle Brothers Machine Company*, *op. cit.*, p. 543.

⁸⁶ *In the matter of Oval Wood-Dish Corporation*, 62 N.L.R.B. (1945), 1129, 1134. See also *In the matter of Libby-Owens-Ford Glass Company*, 63 N.L.R.B. 1 (1945).

⁸⁷ Sec. 8(c) provides: "The expressing of any views, arguments, or opinions, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

But the N.L.R.B. has interpreted this section of the 1947 labor law to permit employers to compel their workers to listen to anti-union speeches prior to a bargaining election on company time without loss of pay. *In the matter of Babcock and Wilcox Co.*, 77 N.L.R.B. No. 96 (1948). In 1946, before the enactment of the Labor-Management Relations Act, the Board held in the celebrated "captive audience" case (*In the matter of Clark Bros. Co.*, 70 N.L.R.B. 802) that such employer conduct was unlawful under the Wagner Act.

however, fails to indicate whether or not its terms protect non-coercive and temperate employer utterances when made in a context of general anti-union activity. As noted, the Supreme Court of the United States held that where there exists a history of obvious anti-union conduct, non-threatening remarks of employers may implicate management in an unfair labor practice.

Adjustment of Individual Grievances

Under the terms of the National Labor Relations Act, a labor union certified by the N.L.R.B. became the exclusive representative of all employees within the bargaining unit "for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment."⁸⁸ Consequently an employer violated the Wagner Act if he recognized the majority union as the representative of its members only.⁸⁹ A certified labor organization negotiates for all workers within the unit regardless of their union membership status. Apart from conferring this exclusive status upon certified labor organizations, the Wagner Act, however, provided that "any individual employee or a group of employees shall have the right at any time to present grievances to their employers."⁹⁰

For several years the N.L.R.B. had no occasion to render an interpretation of this portion of the Wagner Act. Early in the war, however, one employer believed that Section 9(a) of the Act gave employees the right to present and adjust grievances individually regardless of the existence of a collective bargaining agreement. The company involved had previously executed a contract with a union certified by the N.L.R.B. Shortly afterwards copies of the contract were distributed to the firm's employees. In addition each worker received a notice signed by the company's president which outlined a grievance procedure unilaterally prepared by the company. Such a procedure was inconsistent with the one set forth in the collective bargaining agreement.⁹¹ On the ground that the employer's conduct indicated a refusal to grant exclusive bargaining rights to the certified union, the N.L.R.B. subsequently found that he engaged in an unfair labor practice.⁹² But when the company appealed the Board's decision, a federal circuit court ruled that the "grievance provision" of the Wagner Act conferred upon employers the right to hear and to adjust any grievance presented by individual employees, notwithstanding the existence of a collective bargaining agreement. It is extremely noteworthy

⁸⁸ National Labor Relations Act, Sec. 9.

⁸⁹ *In the matter of Louisville Refining Company*, 4 N.L.R.B. 844 (1937). The Supreme Court of the United States sustained the ruling, 308 U.S. 81 (1939).

⁹⁰ National Labor Relations Act, Sec. 9(a).

⁹¹ "Telling the Boss," *Business Week*, June 6, 1942, p. 60.

⁹² *In the matter of North American Aviation Company*, 44 N.L.R.B. 604 (1942).

that the Court construed the "grievance provision" to include not only "small out-of-mind grievances," but covered all grievances which employees may wish to adjust.⁹³ The Court apparently indicated that an employer may lawfully adjust individual grievances relating to all conditions of employment regardless of the terms of a collective bargaining contract.

Beyond reversing the Board's decision, the Court's ruling stimulated the first formal N.L.R.B. interpretation of the "grievance provision." In general, the Board's General Council took the position that the provision means that an individual employee has the technical right to present grievances to his employer, but that representatives of the certified union must be present at each time of such presentation, and must negotiate the settlement of the grievance.⁹⁴ Under this construction, the Wagner Act "grievance provision" extended to individual workers the mechanical right of presentation of grievances, but reserves to certified labor organizations the exclusive right to settle the grievances.

Such an interpretation appears to be supported by the legislative history of the Wagner Act. In discussing the right of individual workers to present grievances, Senator Walsh stated:

I do not think it was the intent of the proponents of this legislation and I do not think it was the intent of the proponents of this language not to permit groups to present grievances, nor was it intended to debar minority groups from sitting in if the employer and the majority were willing, but in any event of their not sitting in on any negotiations that they be separately heard by the employers and their grievances or their suggestions received and in turn presented by him to the majority group.⁹⁵

Apparently Senator Walsh believed that nothing in the National Labor Relations Act prohibited individual employees from presenting grievances, but indicated that majority unions must adjust them. When the House of Representatives was considering the National Labor Relations Act, some thought was given to the clarification of the "grievance provision" by adding the following clause to Section 9 of the Wagner Act: "Provided, further, that if such grievances are presented to the employer, these grievances will be taken up by the employer and the representatives of the majority and settled."⁹⁶ Obviously, if this provision were included in the Wagner Act there could be no area of controversy, as grievances presented by individual workers could only be adjusted by agents of the certified labor organizations. However, Congress probably believed that the general nature of the Wagner Act indicated that majority unions should ultimately negotiate the settlement of all grievances and failed to include this clarifying provision.

⁹³ *N.L.R.B. v. North American Aviation Company*, 136 Fed. (2d) 898, 899 (CCA-9, 1943).

⁹⁴ "Individual Grievance Presentation," *Labor Relations Reporter*, October, 4, 1943, vol. 13, p. 142.

⁹⁵ *Hearings on S. 1958 Before the Senate Committee on Education and Labor*, 74th Congress, 1st Session, Part 3, p. 321.

⁹⁶ *Hearings on H.R. 6288 Before the House Committee on Labor*, 74th Congress, 1st Session, p. 211.

Notwithstanding the rule of the federal court in the *North American* case, the N.L.R.B. adopted the construction of its General Counsel, and ruled in a subsequent case that employers must settle grievances presented by individual workers with the majority union. In one instance the Board, in implementing this policy, declared that the right of employees to present grievances was not an "empty one." Such a right, according to the Board, insured to the individual employee that his grievances will not be ignored by the majority union.⁹⁷ Where the exclusive bargaining agent refuses to participate in the adjustment of the grievances, the N.L.R.B. ruled that the employee may individually negotiate with his employer.⁹⁸ In another case, the Board reaffirmed the policy even though the certified union involved in the controversy had not yet negotiated a contract.⁹⁹ Accordingly an unfair labor practice was found inasmuch as the employer ordered any individual with grievances to take them up directly with management. It is noteworthy that the National War Labor Board also ruled that final adjustment of grievances had to be made with majority unions and not upon an individual basis.¹⁰⁰

Ultimate solution of this problem could only be made by the Supreme Court of the United States and by the Congress. The high Court in 1945 and 1946, in cases involving the railroad industry, limited the authority of the Railroad Brotherhoods to settle employee grievances before the Railway Adjustment Board.¹⁰¹ Unless it could be shown that individual railway employees authorized their unions to act for them, the Court held that awards handed down by the Railway Adjustment Board are vulnerable. A few large unions embracing members employed in mass production, anticipating a similar rule for general industry, immediately amended their constitutions in a manner which gives the unions full authority to negotiate and settle finally all grievances of their members.¹⁰² However, if the Supreme Court were to extend the *Elgin* doctrine throughout all industry, such a precautionary device would not cover non-union employees who are part of the bargaining unit.

The issue of individual presentation and adjustment of employee grievances was dealt with by the Labor-Management Relations Act, 1947.¹⁰³ This law provides that any single worker, whether or not a union member, may present grievances of any character to his employer and have such complaints adjusted by management without the participation of the bargaining representative. Two safeguards for labor organizations,

⁹⁷ *In the matter of Hughes Tool Company*, 56 N.L.R.B. 981 (1944).

⁹⁸ *National Labor Relations Board, Tenth Annual Report* (1945), p. 64.

⁹⁹ *In the matter of Ross Gear and Tool Company*, 63 N.L.R.B. 1012 (1945).

¹⁰⁰ *In re Douglas Aircraft Company*, 25 War Labor Reports 57 (1944).

¹⁰¹ See *Elgin, Joliet and Eastern Railway Company v. Burley*, 65 S. Ct. 1283 (1945), and *Elgin, Joliet and Eastern Railway Company v. Burley*, 66 S. Ct. 721 (1946).

¹⁰² *Labor Relations Reporter*, April 1, 1946, vol. 17, p. 1087.

¹⁰³ Sec. 9(a).

however, are set up in the 1947 labor law. One of these requires that the adjustment of a grievance presented on an individual basis must be consistent with the terms of a collective bargaining contract in effect at the time of the presentation and adjustment of the grievance. For example, an employer awarding a wage increase, on the basis of an individual presentation of a grievance, in violation of an existing collective bargaining agreement could be charged with an unfair labor practice. Secondly, officials of a bargaining representative must be afforded the opportunity to be present at the time the adjustment of an individually presented grievance is made. Failure of the N.L.R.B. and the courts to give full recognition to these two limitations might result in a serious set-back to the collective bargaining process.

PART IV
Conclusions

EVALUATION OF WARTIME OPERATIONS

Rapid Disposal of Wartime Disputes

Early in the war period the Board modified its procedure in order to speed the disposition of wartime cases. It was felt that rapid disposal of Wagner Act disputes would materially foster the uninterrupted operation of war industries. To accomplish this objective, the N.L.R.B. expanded the authority of its regional directors¹ and attached greater importance to the Board's trial examiners' "Intermediate Reports."² In addition, the time in which a party to an N.L.R.B. proceeding could request oral argument before the Board and the period allotted for the filing of statements of exceptions to "Intermediate Reports" were reduced.³ Finally, the agency also ruled that only one runoff election would be authorized in the event the original election proved inconclusive.⁴ A brief examination of these time-saving techniques follows.

Before World War II, the N.L.R.B. reserved to itself the full authority to issue complaints in unfair labor practice disputes and to direct hearings in representation cases. Of necessity this arrangement slowed the disposition of Board cases. Prompted by the wartime demand for speed, the agency authorized its regional directors to issue complaints and to direct representation hearings.⁵ Regional directors were subsequently authorized to order bargaining elections at any stage of the representation proceedings.⁶ Of course the ultimate certification of any trade union remained an exclusive function of the N.L.R.B.⁷ Subsequent events

¹ National Labor Relations Board, *Rules and Regulations*, Series 2, as amended, October 20, 1942, p. 3 and *Rules and Regulations*, Series 2, as amended, October 28, 1943, p. 13.

² National Labor Relations Board, *Rules and Regulations*, Series 2, as amended, September 6, 1941, p. 8.

³ National Labor Relations Board, *Rules and Regulations*, Series 2, as amended, October 28, 1942, p. 11.

⁴ National Labor Relations Board, *Rules and Regulations*, Series 3, November 26, 1943, p. 19. The Labor-Management Relations Act, 1947, Sec. 9(c)(3), provides that where the original bargaining election results indicate that none of the choices receives a majority, a runoff election shall be conducted. On the runoff ballot will appear only the two choices receiving the largest and the second largest number of valid votes cast in the original election.

⁵ Only in cases involving "new questions of law" were the regional directors required to obtain prior approval of the Board before taking this action. National Labor Relations Board, *Seventh Annual Report* (1942), p. 11.

⁶ National Labor Relations Board, *Rules and Regulations*, Series 3, as amended, November 27, 1945, Article III, Sections 1, 3-5, 8-10. In this respect, the regional directors were required to consult with the Board prior to directing elections in only cases which presented "substantial issues." See National Labor Relations Board, *Tenth Annual Report* (1945), p. 15.

⁷ Under the new rules, the parties' rights were further safeguarded by providing the opportunity to any party to the representation dispute to file exceptions to the regional proceeding. Thus after the N.L.R.B. receives the case, any party within seven days can effect a hearing in the case by protesting the regional directed election. If no exceptions are made within seven days, however, the Board may forthwith issue a certification or dismiss the petition. On this score, Chairman Herzog stated that "the new procedure does not deprive anyone of any right he now may have. Under it, all parties, at a public hearing, will still have full opportunity to present their views on all aspects of the proceeding." See "New Procedures for Speeding Elections," *Labor Relations Reporter*, December 3, 1945, vol. 17, p. 416.

indicated the successful operation of these wartime procedural changes.⁸

Prior to 1941, the N.L.R.B. merely utilized its trial examiners' "Intermediate Reports" as an aid to its ultimate decision of cases. Each matter entailed a complete rewriting at the Washington level. Under the new arrangement the Board's decisions are geared closely to the "Intermediate Reports."⁹ As long as an "Intermediate Report" accurately reflects the record of a case and embodies the applicable principles of law, the Board will use the "Report" as the foundation for its formal decision and order. The time allotted for requesting oral argument before the Board, and the period within which a statement of exceptions to "Intermediate Reports" can be filed, were decreased from twenty and thirty days to ten and fifteen days respectively. Prewar election procedure provided that if there were three or more labor organizations on the original ballot, and if none of the contestants received a majority vote in the first poll, the Board was prepared to direct, if necessary, several runoff elections. In these runoff elections, the union which polled the smallest vote in the preceding contest was dropped from subsequent ballots until a labor union was chosen or rejected by a majority of the votes. Under the new procedure, only one runoff election was authorized, and the employees had the opportunity to choose between the top two contestants.

Events demonstrated that these procedural changes expedited the disposition of both wartime unfair labor practice and representation cases. With respect to unfair labor practice cases, the Board reports that the median interval between the filing of a charge and the opening of a hearing in the case was decreased from 200 days in 1942 to 125 days in 1943.¹⁰ In representation cases, the time lag between the institution of a certification petition until the commencement of the hearing was cut from forty-four days in 1942 to thirty-one days in 1943. At the Board level a similar reduction in processing time is noted. In 1942 an average interval of four months elapsed from the time that an unfair labor practice case was transferred to the N.L.R.B. in Washington until disposition of the case was accomplished. This time lag by June, 1943 was reduced to only two months. In representation cases, the corresponding intervening period was shortened from twenty-seven days during the first six months of 1942

⁸ Thus 70 percent of all complaints in the fiscal year 1943 were issued by regional directors without prior approval from the N.L.R.B. In 92 percent of these cases, the Board, in whole or in part, sustained the complaints. Furthermore, regional directors, in the same year, without prior advice from Washington, directed representation hearings in approximately 86 percent of all cases resulting in hearings. See National Labor Relations Board, *Eighth Annual Report* (1943), p. 13. In a personal interview, George J. Bott, Wartime Regional Director of the Board's Thirteenth Region (Chicago), reported that his office's experience with the new procedure had been extremely satisfactory. In general, the Board has sustained all the complaints issued by the Chicago office. Moreover, Bott reported that the new procedure was acclaimed by both employers and trade unions.

⁹ National Labor Relations Board, *Rules and Regulations*, Series 2, as amended, September 6, 1941, p. 8. Under the amended procedure, the Board directed the Chief Trial Examiner to file the original of the "Intermediate Report" with the Board, and to serve copies on each of the parties. Thereupon the Board transferred the case to itself by formal order. Formerly, the "Intermediate Report" in each case had been sent by the trial examiner to the regional director.

¹⁰ National Labor Relations Board, *Eighth Annual Report* (1943), p. 13.

to less than seventeen days by June, 1943.¹¹ The changes in the Board's internal procedure resulted in an accelerated disposition of collective bargaining controversies. As a result, war production was probably promoted by the comparatively rapid elimination of possible sources of labor strife. Since the procedural changes proved successful during World War II, they were retained after the termination of hostilities.

Apart from the expedition of all wartime Wagner Act disputes, the N.L.R.B. paid special attention to controversies which directly involved war plants. Upon many occasions the United States Conciliation Service, the National War Labor Board, the National Defense Mediation Board, the Office of Production Management, and the War and Navy Departments requested the Board to give priority to unfair labor practice and representation cases which threatened the disruption of war production.¹² Frequently, action by the N.L.R.B. was the prerequisite to ultimate settlement by the Conciliation Service and by the N.W.L.B. of disputes over wages and other conditions of employment.¹³ These circumstances often arose in representation disputes. Some cases, beyond including disputes over wages and hours, involved trade unions which were competing for exclusive recognition. Confronted with such a situation, the Conciliation Service, for example, could not recommend the execution of a contract adjusting the controversies over the terms of employment until the N.L.R.B. first certified the majority union. The Conciliation Service reports that this was a common wartime occurrence.¹⁴

Working in close relationship with the other federal agencies, the N.L.R.B. made "every effort to give priority to important cases which might [have interfered] with war production."¹⁵ To implement the priority policy, a liaison system was instituted which facilitated the exchanging of information between the N.L.R.B. and the other wartime agencies.¹⁶ Upon proper request, the N.L.R.B. acted with speed to dispose of either unfair labor practices or representation disputes which threatened to obstruct war production.¹⁷ As an example of this close cooperation, the

¹¹ *Ibid.*, p. 14.

¹² "Defense Funds for Labor Agencies," *Labor Relations Reporter*, January 12, 1942, vol. 9, p. 514.

¹³ National Labor Relations Board, *Seventh Annual Report* (1942), p. 5.

¹⁴ This information was obtained from C. H. Alsip, Field Supervisor of the Chicago Office of the United States Conciliation Service.

¹⁵ National Labor Relations Board, *Ninth Annual Report* (1944), p. 3.

¹⁶ In a personal interview, C. H. Alsip, Field Supervisor of the Chicago Regional Office of the United States Conciliation Service, discussed the wartime liaison activities of his office with the N.L.R.B. He stated that the Chicago Regional Office of the N.L.R.B. gave immediate attention to all unfair labor practice or representation disputes which the Conciliation Service certified as threatening to war production. He further asserted that his office was in constant touch with the N.L.R.B. and claimed that the two agencies exchanged information at least "a dozen times a week." According to Alsip, the relations between the Chicago offices of the Conciliation Service and the N.L.R.B. were excellent and that the N.L.R.B. was "very cooperative" with respect to complying with Conciliation Service requests. He concluded by stating that the "cooperation techniques" developed during World War II proved so satisfactory that both agencies intended to utilize them in the postwar period.

¹⁷ National Labor Relations Board, *Eighth Annual Report* (1943), p. 5.

Board, after consultation with the War Shipping Administration and the Post Office Department, expedited the balloting of seamen "by making use of the mail service for members of the crews of the merchant marine."¹⁸ By giving priority to cases which threatened to disrupt war production, and by cooperating otherwise with other wartime agencies, the N.L.R.B. appears to have played its part in furthering the national war effort.

Alleviation of the Wartime Labor Shortage

The National Labor Relations Board was aware of the nation's serious wartime labor shortage. As already noted, the agency attempted to alleviate this condition by implementing Fair Employment Practice Committee principles.¹⁹ Another effort involved the Board's authority to award back pay to discriminatorily discharged workers.²⁰ Under the terms of the Wagner Act the N.L.R.B. is authorized to reinstate employees unlawfully discharged with back pay. Before the war an employee was ordinarily awarded back pay for the period during which he was illegally discharged less any net earnings which the worker may have earned during the interval.²¹ In the absence of other earnings, an employer was not authorized to make any deduction from the full amount of back pay due the discharged employees unless the employer could prove conclusively that the worker unjustifiably refused suitable work, or had given up a suitable job.²²

In view of the critical wartime manpower shortage, however, the Board altered the prewar back pay policy. As a result of the wartime doctrine a discharged worker was required to make a "reasonable effort" to secure new employment before the N.L.R.B. would award him back pay.²³ For purposes of qualifying for back pay, an employee, however, was deemed to have made a "reasonable effort" if he registered at a United States Employment Service Office. In the absence of registration, the parties to the dispute were permitted to present further evidence to prove what effort the worker made to secure additional employment. Unless the evidence revealed that the discharged employee made an effort to find another position, the employer, under the terms of this wartime policy, was not required to award back pay. Prompted by the critical wartime labor shortage, the Board insisted that discriminatorily discharged

¹⁸ National Labor Relations Board, *Ninth Annual Report* (1944), p. 4.

¹⁹ See *supra*, chap. 8.

²⁰ National Labor Relations Act, 49 Stat 449, Sec. 10(c).

²¹ See National Labor Relations Board, *Fourth Annual Report* (1939), p. 98. On this point the N.L.R.B. declared that "in addition to requiring the reinstatement of an employee discriminated against, the Board usually orders an employer to make such employee whole for loss of pay which he normally would have earned had the unfair labor practice not occurred."

²² This position was sustained by the Supreme Court in *Phelps-Dodge Corporation v. N L.R.B.*, 313 U.S. 177 (1941).

²³ *In the matter of the Ohio Public Service Company*, 52 N.L.R.B. 725 (1943).

workers make a reasonable attempt to locate new employment. On this score the Board declared:

In view of the exigencies of war, the current manpower shortage, and present employment opportunities, we shall for the duration of this war, permit employers to adduce evidence not only whether a dischargée has unjustifiably refused to accept, or has given up, desirable new employment, but also on whether he has made a reasonable effort to obtain such employment. In view of the availability of the United States Employment Service offices . . . we shall regard registration with such an office as conclusive evidence that a reasonable search for employment has been made.²⁴

In this manner the Board accommodated a prewar principle to wartime conditions and probably helped to reduce wartime idleness.

The N.L.R.B. also encouraged the full utilization of the wartime labor supply by refusing to afford the full protection of the Wagner Act to employees who unreasonably interfered with war production. One typical instance involved a strike effected by employees who refused to work overtime.²⁵ In this connection the Board pointed out that "by refusing to work overtime and leaving their jobs before the close of the working day, these employees clearly indicated their unwillingness to continue working on the terms prescribed by the [company]."²⁶ Accordingly the N.L.R.B. refused to extend the protection of the National Labor Relations Act to the striking employees, and declined to direct their reinstatement. Minority unions which called strikes were also denied the full protection of the Wagner Act.²⁷ In order to discourage these work stoppages, the N.L.R.B. ruled that an employer could lawfully utilize his superior economic position to encourage strikers to return to work. Confronted with this type of a strike, an employer was authorized to make direct appeals to strikers to return to work through the press and leaflets; to publicize his views on the merits of the work stoppage by characterizing the strike as "entirely unwarranted and unjustified" and as interfering with operations important to "very vital national defense industries";²⁸ and to award bonuses to employees who refused to participate in such unauthorized strikes.²⁹

Strike Prevention

Anxious to promote the war production program, the N.L.R.B. also took action to reduce the number of wartime strikes. Before the war the Board ordinarily adhered to the principle of non-interference in representation disputes between rival unions affiliated with the same parent

²⁴ *Ibid.*, p. 729.

²⁵ *In the matter of Mt. Clemens Pottery Company*, 46 N.L.R.B. 714 (1943).

²⁶ *Ibid.*, p. 715.

²⁷ *In the matter of Charles Bloom*, 45 N.L.R.B. 1250 (1942). It is noteworthy that the National War Labor Board also discouraged such unauthorized strikes by refusing unions which instigated them maintenance of membership clauses. See *In re Electric Storage Battery Company*, Case No. 207, *War Labor Reports*, vol. 5, p. 227 (1942).

²⁸ *In the matter of Gulf States Utilities Company*, 42 N.L.R.B. (1942), 988, 1014.

²⁹ *In the matter of Charles Bloom*, *op. cit.*, p. 1258.

TABLE 3. FREQUENCY OF JURISDICTIONAL STRIKES, 1941-1945

	1941	1942	1943	1944	1945
Strikes					
Number	93	50	53	70	72
Percentage of Total	2.2	1.6	1.4	1.4	1.6
Workers Involved					
Number	37,410	8,956	9,362	17,551	49,100
Percentage of Total	1.6	1.1	5	8	1.6
Man-Days Idle					
Number	260,985	41,599	40,544	56,656	645,800
Percentage of Total	1.1	.9	.3	6	2.7

Source: *Monthly Labor Review*, May, 1942, vol. 54, p. 1125; May, 1943, vol. 56, p. 973; May, 1944, vol. 58, p. 937; May, 1945, vol. 60, p. 968; May, 1946, vol. 62, p. 732.

federation.³⁰ It believed that rival unions affiliated with the same national union could resort to the procedures established by the parent organization to resolve any representation jurisdictional dispute. In many cases, however, one of the disputants refused to recognize the authority of the national organization, or the parent union failed to resolve the dispute. Moreover, the national organization at times resolved such disputes in an unjust manner because of union politics.³¹ Consequently many strikes have resulted from jurisdictional disputes.

Aware that labor organizations were not satisfactorily adjusting these disputes through their own efforts, the N.L.R.B., early in the war, modified its representation dispute policy. In a 1942 case, an employer involved in a representation jurisdictional conflict between rival organizations belonging to the same parent organization was advised to submit a certification petition.³² Under the new rule the Board was prepared to entertain such a petition as long as (1) disposition of the existing conflict could not be achieved without resort to the administrative process of the Wagner Act; and (2) no other remedy was available to the employer confronted by the problem of determining which of two rival unions was the proper collective bargaining representative of the employees involved.³³

Table 3 indicates the number of jurisdictional strikes of all types occurring in industry during 1941-1945. While there were 93 jurisdictional strikes in 1941, composing 2.2 per cent of all strikes, which resulted in the sizeable loss of 260,985 man-days of work, the number sharply decreased

³⁰ However, the Board, since July 14, 1939, entertained employer certification petitions in cases involving two competing unions affiliated with different parent federations. National Labor Relations Board, *Rules and Regulations*, Series 2, effective July 14, 1939, Article III, Sec. 2(b), p. 12.

³¹ "N.L.R.B. Opens Door to Settlement of Jurisdictional Disputes," *Labor Relations Reporter*, Supplement, September 21, 1942, vol. 11, p. 4.

³² *In the matter of Harbison-Walker Refractories Company*, 43 N.L.R.B. 936 (1942).

³³ *In the matter of the Pullman Standard Car Manufacturing Company*, 43 N.L.R.B. 971 (1942).

in 1942 to 50 strikes constituting only 1.6 per cent of all 1942 strikes, and which caused 41,599 man-days loss to industry. Jurisdictional strikes continued to be of less importance in 1943 and 1944 than they were in 1941. Though the N.L.R.B. wartime representation dispute policy probably aided in the reduction of World War II jurisdictional strikes, the jurisdictional strike frequency for 1945, the year in which labor was released from its wartime no-strike pledge, apparently indicates that these strikes could not be materially reduced unless labor organizations made a determined effort to settle their jurisdictional controversies in a peaceful manner. Actually the 1945 experience seems to show that labor's wartime no-strike pledge was probably a more important factor in reducing the number of 1942-1944 jurisdictional strikes than was the Board's new policy. The general welfare would be advanced if labor unions continued to make a serious attempt to adjust their jurisdictional disputes in a peaceful manner. Trade unions can accomplish this objective by resorting to their own internal procedures, or to arbitration, or they can resort to the N.L.R.B. election machinery. Inasmuch as the jurisdictional strike appears to have so little justification, Congress when it enacted the Labor-Management Relations Act, 1947, outlawed all forms of jurisdictional strikes and empowered the N.L.R.B. to settle finally any jurisdictional dispute.³⁴

Apart from the willingness of the Board to settle representation disputes between rival organizations affiliated with the same national organization, the N.L.R.B. resolved many A.F.L. and C.I.O. wartime representation jurisdictional disputes.³⁵ In fact, rivalry between these two organizations increased during the war because of the expansion of industry, the parallel increase in the level of employment, and the corresponding intensification of trade union organizational drives.³⁶ During the fiscal years 1942-1945, the N.L.R.B. conducted 2120 elections and cross-checks in which the sole contestants were A.F.L. and C.I.O. affiliates. In these elections, workers, casting 809,551 valid votes, selected C.I.O. unions in 53.9 per cent cases, A.F.L. affiliates in 38.9 per cent instances, and rejected both in 7.2 per cent of elections.³⁷ Had not the Board's election machinery been available to the participants, it is probable that the C.I.O.-A.F.L. rivalry would have resulted in more jurisdictional strikes than actually occurred during the period under consideration.

³⁴ Sec. 8(b)(4). ³⁵ See *supra*, p. 241, n. 30

³⁶ Brooks, *National Labor Policy and Total Defense* (American Council on Public Affairs, Washington, D.C., 1941), p. 9.

³⁷ See National Labor Relations Board, *Annual Reports* for years 1942, 1943, 1944, 1945 at pages 88, 95, 85, and 86 respectively. In comparison, the N.L.R.B. during 1936-1940 conducted a total of only 3386 elections and cross-checks in which 1,225,098 valid votes were cast. Thus the C.I.O.-A.F.L. World War II elections and cross-checks alone approached the total amount of elections and cross-checks administered by the Board during its first five years of existence. See National Labor Relations Board, *Tenth Annual Report* (1945), p. 8.

Beyond settling C.I.O.-A.F.L. representation disputes, the Board conducted many elections in which C.I.O. and A.F.L. affiliates opposed independent labor unions. In the fiscal years 1942-1945, the Board held 966 elections and cross-checks which involved C.I.O. and unaffiliated labor unions. In these, employees, casting 680,058 votes, chose C.I.O. unions in 56.9 per cent of the cases, independent unions in 40.4 per cent instances, and rejected both in 2.7 per cent of the elections. With respect to A.F.L. and unaffiliated unions, the Board conducted 676 elections and cross-checks, in which workers, casting 189,531 ballots, chose A.F.L. affiliates in 52.5 per cent of the cases, independent labor organizations in 43.6 per cent of the instances, and rejected both in 3.9 per cent of the elections.³⁸ In total, the N.L.R.B. during the war period conducted approximately 3762 elections and cross-checks, involving 1,679,140 valid votes, in which rival unions sought certifications.

In addition to these inter-union representation cases, the N.L.R.B. adjusted thousands of other wartime Wagner Act disputes. During the fiscal years 1942-1945, the agency administered a total of 17,996 bargaining elections in which 4,159,890 valid votes were cast.³⁹ In the same period, 13,370 unfair labor practice cases were filed with the Board.⁴⁰ Moreover these disputes frequently involved industries directly engaged in the production of war material.⁴¹ In the light of these considerations it appears that the number of World War II organizational strikes probably would have been greater had the disputants been unable to resort to the peaceful N.L.R.B. procedures. At this time it appears desirable to examine further the relationship of the N.L.R.B. to the wartime organizational strike problem.

Organizational Strike Problems

Inspection of the terms of the National Labor Relations Act reveals that the statute attempted to diminish the number of organizational strikes.⁴² By eliminating the causes for collective bargaining strikes the Wagner Act sought to promote industrial peace. On the other hand, it must be pointed out that the Act did not purport to eliminate all the causes for work stoppages. Unless we are prepared to make fundamental changes in the law of industrial relations, disputes arising over the terms and conditions of employment will continue to result in interruptions of production. Thus one test for the justification of the Wagner Act in war or in peace turns on the Act's success in decreasing the number of strikes arising from organizational issues. With this fact in mind, the National Labor Relation Act's success in promoting labor peace during World War II may in part be determined by (1) comparing the number of

³⁸ *Ibid.* ³⁹ National Labor Relations Board, *Tenth Annual Report* (1945), p. 8.

⁴⁰ *Ibid.*, p. 6 ⁴¹ See *supra*, pp. 24-25. ⁴² See National Labor Relations Act, Sec. 1.

organizational strikes which occurred in 1934-1936, the years immediately preceding the effective operation of the Act, with those which took place during World War II; and (2) comparing the frequency of these World War II work stoppages with those of World War I.

Comparison of the Frequency of Organizational Strikes in 1934-1936 with Those of World War II

It is reported that approximately 50 per cent of all strikes which occurred during the years 1934-1936 resulted wholly or in part from organizational disputes.⁴³ Furthermore these strikes involved about 43 per cent of the workers who engaged in all strikes during this period.⁴⁴ In contrast, the Bureau of Labor Statistics states that in 1942, the first full year of World War II, organizational controversies wholly or in part caused 31.2 per cent of all strikes.⁴⁵ In subsequent war years, the collective bargaining strike was even of less comparative importance. Thus in 1943, organizational disputes, alone or in a combination with other causes, resulted in 15.7 per cent of all work stoppages;⁴⁶ in 1944 they caused 16.3 per cent of all strikes;⁴⁷ and in 1945 collective bargaining disputes wholly or in part caused 20.5 per cent of all work stoppages.⁴⁸ As for the number of workers engaged in these strikes, the Bureau of Labor Statistics reports that during the war years (1942-1945) work stoppages carried out for organizational purposes alone or in a combination with other causes involved approximately 18.5 per cent of all workers who engaged in strikes in this period.⁴⁹ In the light of the organizational strike experience during 1934-1936, it is likely that in the absence of the effective operation of the N.L.R.B. in World War II, organizational strikes probably would have been of greater absolute and comparative importance during World War II.

Comparison of the Frequency of Recognition Strikes in World War I and II

As noted above, a comparison of the frequency of collective bargaining strikes which arose during World War I with those which occurred in World War II might further indicate the extent to which the Wagner

⁴³ See *Monthly Labor Review*, vol. 42, pp. 162 and 1308, and vol. 44, p. 1230. Although the Wagner Act was approved by Congress on June 27, 1935, and signed by President Roosevelt on July 5, 1935, the statute as noted in chap. 1, above, was not effective until the Supreme Court approved the legislation on April 1, 1937. Consequently, to ascertain the effectiveness of the Wagner Act in reducing organizational strikes, it appears appropriate to disregard 1935 and 1936, although the Act was technically in operation during these two years. See p. 10 for organizational strike frequency for 1919-1933.

⁴⁴ Unfortunately the Bureau of Labor Statistics does not report the man-days lost to industry which resulted from these 1934-1936 work stoppages.

⁴⁵ *Monthly Labor Review*, May, 1943, vol. 56, p. 973.

⁴⁶ *Monthly Labor Review*, May, 1944, vol. 58, p. 937.

⁴⁷ *Monthly Labor Review*, May, 1945, vol. 60, p. 968.

⁴⁸ *Monthly Labor Review*, May, 1946, vol. 62, p. 732.

⁴⁹ See same references as indicated in n. 45-48, above.

Act was successful in decreasing such work stoppages in World War II. Such an analysis is of particular significance because no agency similar to the N.L.R.B. existed during World War I. Even though the first N.W.L.B., in addition to its major functions, was directed to insure to employees their right to self-organization and collective bargaining,⁵⁰ one could scarcely have expected the first N.W.L.B. in this respect to have attained the efficiency of the N.L.R.B. Unlike the former agency, the N.L.R.B. had the benefit of the experience of approximately five full years of operation before the nation entered World War II.

An analysis of the records of the Bureau of Labor Statistics reveals that the Bureau has maintained faithfully throughout the years the number of strikes resulting from the refusal of employers to recognize their employees' unions.⁵¹ Under the terms of the Wagner Act an employer engages in an unfair labor practice if he refuses to recognize a certified labor organization as the exclusive representative of the workers included in the bargaining unit.⁵² Accordingly, workers during World War II had little reason to engage in strikes to gain recognition for their labor unions, since their organizations could accomplish this objective by resorting to the peaceful machinery provided by the N.L.R.B. During World War I, when there existed no agency similar to the N.L.R.B., it is reported that 314 strikes and lockouts were caused by employers' refusal to recognize unions in 1917, and 221 such work stoppages took place in 1918.⁵³ Expressed as a ratio, recognition strikes accounted for approximately 7 per cent of all 1917 strikes and lockouts, and such interruptions to production resulted in 6.5 per cent of all work stoppages occurring in 1918.⁵⁴ On the other hand, the Bureau reports that in 1942, the first full year of World War II, only 169 recognition-caused work stoppages occurred and that they accounted for 5.6 per cent of all 1942 interruptions.⁵⁵ In subsequent years, the record indicates that the recognition strike continued to be of less comparative and absolute importance during World War II as compared with its importance in World War I.

Even though the lack of World War I data precludes a comparison of World War I and World War II recognition strikes, on a "man-days lost" basis, it still appears that World War II employees and trade unions, able to utilize the N.L.R.B. procedures, resorted to the recognition strike less frequently than did World War I employees. In the light of these

⁵⁰ See *supra*, pp. 116-117, for the first National War Labor Board experience in this respect.

⁵¹ With respect to other organizational causes of strikes, the Bureau's terminology is not wholly consistent, and consequently the only valid comparison appears to be limited to strikes caused by refusal of employers to recognize their employees' labor organizations for purposes of collective bargaining. ⁵² National Labor Relations Act, Sec. 8(5).

⁵³ *Monthly Labor Review*, June, 1919, vol. 8, p. 1861.

⁵⁴ Unfortunately, the Bureau of Labor Statistics does not report the number of workers involved in these union recognition strikes, nor the man-days lost to industry because of them.

⁵⁵ *Monthly Labor Review*, May, 1943, vol. 56, p. 973.

TABLE 4. UNION RECOGNITION WORK STOPPAGES
WORLD WAR I AND WORLD WAR II

Year	Number of Work Stoppages	Percentage of Total of All Work Stoppages
1917	314	7.0
1918	221	6.5
1942	169	5.6
1943.	92	2.5
1944	202	4.1
1945... . .	226	5.0

Source: *Monthly Labor Review*, June, 1919, vol. 8, p. 1861; May, 1943, vol. 56, p. 973; May, 1944, vol. 58, p. 937; May, 1945, vol. 60, p. 968; May, 1946, vol. 62, p. 732.

considerations, it is probable that the number of World War II recognition strikes would have been greater had there been no N.L.R.B. during World War II.

Conclusions on 1947 Labor Law

Legal implementation of the collective bargaining process aided the nation's war effort. The wartime experiences of the N.L.R.B. disclose in part the necessity for legal protection of employees' organizational rights. This support appears to be the prerequisite to effective collective bargaining, a process necessary for the realization of modern industrial harmony.

The wartime experiences of the N.L.R.B. do not provide a basis for a general evaluation of the Labor-Management Relations Act, 1947, the law which supplants the Wagner Act. It is not appropriate, therefore, to present such an analysis in this study. However, certain provisions of the 1947 labor law would have affected the manner in which the Board resolved some of its wartime problems had that law been in effect during World War II. Attention has been directed to these particular sections in the foregoing chapters. A brief summary and evaluation of these provisions of the Labor-Management Relations Act, 1947 appear in order at this time.

Little objection can be raised against the section of the 1947 labor law requiring labor organizations to bargain collectively.⁵⁶ This obligation places no real hardship upon responsible labor organizations, but merely discourages tactics employed at times by uncooperative and recalci-

⁵⁶ Labor-Management Relations Act, 1947, Sec. 8(b)(3). In this connection it should be noted that the N.L.R.B. in the celebrated *Times* decision refused to extend the protection of the Wagner Act to a labor union which refused to bargain in good faith. This decision was handed down by the Board before the Labor Management Act, 1947, took effect. *In the matter of Times Publishing Company*, 72 N.L.R.B. 676 (1947).

trant labor union officials.⁵⁷ The provision of the 1947 labor law⁵⁸ outlawing strikes carried out to compel management to recognize and bargain with a union when another labor organization has been certified can be defended on the basis of the wartime experiences of the N.L.R.B. Reference has already been made to the fact that disputes of this character caused the Board some concern in the war period.⁵⁹ Such strikes, wholly inconsistent with the principle of majority rule, may well be eliminated from the area of industrial conflict.

Though constituting a small proportion of all World War II strikes, the jurisdictional strike resulted in a significant loss of wartime production.⁶⁰ These strikes declared unlawful by the Labor-Management Relations Act, 1947⁶¹ have been condemned as socially undesirable by management, many labor leaders, and students of labor problems. The outlawing of this type of strike, therefore, appears justified. Nor can criticism be leveled against the section of the 1947 labor law which guarantees the right to employers to express views to their employees regarding issues of collective bargaining.⁶² The interests of labor organizations also appear to be protected by this provision since employers may be charged with unfair labor practices whenever their remarks are coercive or threatening in nature. As noted in Chapter 13, the Board devoted much attention to the employer "free speech" issue during World War II.

Had the Labor-Management Relations Act, 1947 been in effect during World War II, the Board would not have been able to afford any protection to foremen exercising their right to self organization and collective bargaining.⁶³ This situation probably would have stimulated supervisors' organizational strikes, for foremen did engage in many strikes of this character after the Board of its own volition refused to grant this group of workers legal support of their right to self-organization.⁶⁴ Plant guards' labor organizations might also have resorted to industrial warfare to implement the right of collective bargaining. The 1947 labor law forbids the certification of a plant guards' union affiliated with a production workers' labor organization.⁶⁵ Since the Labor-Management Relations Act, 1947 relaxes the restrictions against management-filed petitions,⁶⁶ it is possible that the National War Labor Board would not have handed

⁵⁷ See *In re Cribben and Sexton Company*, National War Labor Board Case No. 111-12,000-D. During a hearing in this case, the President of a local union refused to take steps to negotiate differences with management, maintaining that a wartime strike involving his union was undertaken "to hurt management." He further stated that "the more I can hurt management, the more I am going to hurt management." ⁵⁸ Sec. 8(b)(C). ⁵⁹ *Supra*, p. 77.

⁶⁰ *Supra*, p. 241. ⁶¹ Sec. 8(b)(4).

⁶² Sec. 8(c). But the ruling of the N.L.R.B. in the *Babcock and Wilcox Co.* case is highly questionable. See *supra*, p. 230, n. 87. It is not clear that the "free speech" provisions of the Labor-Management Relations Act, 1947, demand such an N.L.R.B. ruling. The power which this ruling gives employers to combat collective bargaining is considerable. A more moderate position might protect the interests of management, the union, and the workers. Thus perhaps fairness demands that the union, as well as management, be given the opportunity to present its case at company-instigated "captive audience" meetings. ⁶³ Sec. 2(3). ⁶⁴ *Supra*, pp. 186-188.

⁶⁵ Sec. 9(b)(3). ⁶⁶ Sec. 9(c)(B).

down the *Chicago Transformer* decision if that law had been in effect during the war period.⁶⁷ The National War Labor Board felt that the doctrine established in this case was necessary for uninterrupted wartime collective bargaining. Perhaps a number of employers, with the support of some federal courts, might have taken advantage of the section of the Labor-Management Relations Act, 1947 which sets up the procedure to be followed in the individual presentation and adjustment of grievances.⁶⁸ If this condition resulted in the avoidance of dealing with representatives of collective bargaining agents, it is likely that industrial disturbances during World War II would have been increased.⁶⁹

It is, of course, difficult to ascertain how other sections of the Labor-Management Relations Act, 1947, such as those dealing with union security, the injunction procedure, general union unfair labor practices, suits against labor organizations, the filing of non-communist affidavits, the outlawing of all secondary boycott activity, and the new status of the N.L.R.B. required by the setting up of the office of the General Counsel might have affected wartime industrial relations. Postwar developments indicate that some of these sections, had they been in effect during World War II, might have prevented the successful wartime operations of the N.L.R.B.

The fact remains that the original National Labor Relations Act during World War II, in the words of its author, Senator Robert F. Wagner, "encouraged industrial peace and protected collective bargaining and has thereby been a great stabilizing factor in American industry. It has advanced representative government in industry with employers and workers, through representatives of their own choosing, discussing their mutual problems together and resolving them on the basis of equality and good faith."⁷⁰

⁶⁷ *Supra*, pp. 145-149.

⁶⁸ Sec. 9(a).

⁶⁹ *Supra*, pp. 231-234.

⁷⁰ *Labor Relations Reporter*, July 9, 1945, vol. 16, p. 670.

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APPENDIX A

NATIONAL LABOR RELATIONS ACT

(49 Stat. 449)

AN ACT

To diminish the causes of labor disputes burdening or obstructing interstate and foreign commerce, to create a National Labor Relations Board, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

FINDINGS AND POLICY

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right to employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" includes one or more individuals, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(4) The term "representatives" includes any individual or labor organization.

(5) The term "labor organization" means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

(8) The term "unfair labor practice" means any unfair labor practice listed in section 8.

(9) The term "labor dispute" includes any controversy concerning terms, tenure, or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

(10) The term "National Labor Relations Board" means the National Labor Relations Board created by section 3 of this Act.

(11) The term "old Board" means the National Labor Relations Board established by Executive Order Numbered 6763 of the President on June 29, 1934, pursuant to Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), and reestablished and continued by Executive Order Numbered 7074 of the President of June 15, 1935, pursuant to Title I of the

National Industrial Recovery Act (48 Stat. 195) as amended and continued by Senate Joint Resolution 133¹ approved June 14, 1935.

NATIONAL LABOR RELATIONS BOARD

SEC. 3. (a) There is hereby created a board, to be known as the "National Labor Relations Board" (hereinafter referred to as the "Board"), which shall be composed of three members, who shall be appointed by the President, by and with the advice and consent of the Senate. One of the original members shall be appointed for a term of one year, one for a term of three years, and one for a term of five years, but their successors shall be appointed for terms of five years each, except that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as the chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

(b) A vacancy in the Board shall not impair the right of the remaining members to exercise all the powers of the Board, and two members of the Board shall, at all times, constitute a quorum. The Board shall have an official seal which shall be judicially noticed.

(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

SEC. 4. (a) Each member of the Board shall receive a salary of \$10,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint, without regard for the provisions of the civil-service laws but subject to the Classification Act of 1923, as amended, an executive secretary, and such attorneys, examiners, and regional directors, and shall appoint such other employees with regard to existing laws applicable to the employment and compensation of officers and employees of the United States, as it may from time to time find necessary for the proper performance of its duties and as may be from time to time appropriated for by Congress. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation (or for statistical work), where such service may be obtained from the Department of Labor.

(b) Upon the appointment of the three original members of the Board and the designation of its chairman, the old Board shall cease to exist. All employees of the old Board shall be transferred to and become employees of the Board with salaries under the Classification Act of 1923, as amended, without acquiring by such transfer a permanent or civil-service status. All records, papers, and property of the old Board shall become records, papers, and property of the Board, and all unexpended funds and appropriations for

¹ So in original.

the use and maintenance of the old Board shall become funds and appropriations available to be expended by the Board in the exercise of the powers, authority, and duties conferred on it by this Act.

(c) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

SEC. 6. (a) The Board shall have authority from time to time to make, amend, and rescind such rules and regulations as may be necessary to carry out the provisions of this Act. Such rules and regulations shall be effective upon publication in the manner which the Board shall prescribe.

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer —

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(2) To dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6 (a), an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require, as a condition of employment, membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(4) To discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

REPRESENTATIVES AND ELECTIONS

SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer.

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any other suitable method to ascertain such representatives.

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section, and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under subsections 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the dis-

cretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. In any such proceeding the rules of evidence prevailing in courts of law or equity shall not be controlling.

(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon all the testimony taken the Board shall be of the opinion that no person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint.

(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the Court of Appeals of the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the Supreme Court of the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceeding, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board as to the facts, if supported by evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its member, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the

facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which, if supported by evidence shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States and upon writ of certiorari or certification as provided in section 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the Court of Appeals of the District of Columbia, by filing in such a court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; and the findings of the Board as to the facts, if supported by evidence, shall in like manner be conclusive.

(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

INVESTIGATORY POWERS

SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 —

(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. Any member of the Board shall have power to issue subpoenas requiring the attendance and testimony of witnesses and the production of any evidence that relates to any

matter under investigation or in question, before the Board, its member, agent, or agency conducting the hearing or investigation. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

(2) In case of contumacy or refusal to obey a subpoena issued to any person, any District Court of the United States or the United States courts of any Territory or possession, or the Supreme Court of the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

LIMITATIONS

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 14. Wherever the application of the provisions of section 7 (a) of the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, sec. 707 (a), as amended from time to time, or of section 77 B, paragraphs (1) and (m) of the Act approved June 7, 1934, entitled "An Act to amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto" (48 Stat. 922, pars. (1) and (m)), as amended from time to time, or of Public Resolution Numbered 44, approved June 19, 1934 (48 Stat. 1183), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other acts shall remain in full force and effect.

SEC. 15. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby

SEC. 16. This Act may be cited as the "National Labor Relations Act."

Approved, July 5, 1935.

APPENDIX B

WAR LABOR DISPUTES ACT

(57 Stat. 163)

AN ACT

Relating to the use and operation by the United States of certain plants, mines, and facilities in the prosecution of the war, and preventing strikes, lock-outs, and stoppages of production, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That this Act may be cited as the "War Labor Disputes Act".

DEFINITIONS

SEC. 2. As used in this Act —

(a) The term "person" means an individual, partnership, association, corporation, business trust, or any organized group of persons.

(b) The term "war contract" means —

(1) a contract with the United States entered into on behalf of the United States by an officer or employee of the Department of War, the Department of the Navy, or the United States Maritime Commission;

(2) a contract with the United States entered into by the United States pursuant to an Act entitled "An Act to promote the defense of the United States";

(3) a contract, whether or not with the United States, for the production, manufacture, construction, reconstruction, installation, maintenance, storage, repair, mining, or transportation of —

(A) any weapon, munition, aircraft, vessel, or boat;

(B) any building, structure, or facility;

(C) any machinery, tool, material, supply, article, or commodity; or

(D) any component material or part of or equipment for any article described in subparagraph (A), (B), or (C); the production, manufacture, construction, reconstruction, installation, maintenance, storage, repair, mining, or transportation of which by the contractor in question is found by the President as being contracted for in the prosecution of the war.

(c) The term "war contractor" means the person producing, manufacturing, constructing, reconstructing, installing, maintaining, storing, repairing, mining, or transporting under a war contract or a person whose plant, mine, or facility is equipped for the manufacture, production, or mining of any articles or materials which may be required in the prosecution of the war or which may be useful in connection therewith; but such term shall not include a carrier, as defined in title I of the Railway Labor Act, or a carrier by air subject to title II of such Act.

(d) The terms "employer", "employee", "representative", "labor organization", and "labor dispute" shall have the same meaning as in section 2 of the National Labor Relations Act.

POWER OF PRESIDENT TO TAKE POSSESSION OF PLANTS

SEC. 3. Section 9 of the Selective Training and Service Act of 1940 is hereby amended by adding at the end thereof the following new paragraph:

"The power of the President under the foregoing provisions of this section to take immediate possession of any plant upon a failure to comply with any such provisions, and the authority granted by this section for the use and operation by the United States or in its interests of any plant of which possession is so taken, shall also apply as hereinafter provided to any plant, mine, or facility equipped for the manufacture, production, or mining of any articles or materials which may be required for the war effort or which may be useful in connection therewith. Such power and authority may be exercised by the President through such department or agency of the Government as he may designate, and may be exercised with respect to any such plant, mine, or facility whenever the President finds, after investigation, and proclaims that there is an interruption of the operation of such plant, mine, or facility as a result of a strike or other labor disturbance, that the war effort will be unduly impeded or delayed by such interruption, and that the exercise of such power and authority is necessary to insure the operation of such plant, mine, or facility in the interest of the war effort: *Provided*, That whenever any such plant, mine, or facility has been or is hereafter so taken by reason of a strike, lock-out, threatened strike, threatened lock-out, work stoppage, or other cause, such plant, mine, or facility shall be returned to the owners thereof as soon as practicable, but in no event more than sixty days after the restoration of the productive efficiency thereof prevailing prior to the taking of possession thereof: *Provided further*, That possession of any plant, mine, or facility shall not be taken under authority of this section after the termination of hostilities in the present war, as proclaimed by the President, or after the termination of the War Labor Disputes Act; and the authority to operate any such plant, mine, or facility under the provisions of this section shall terminate at the end of six months after the termination of such hostilities as so proclaimed."

TERMS OF EMPLOYMENT AT GOVERNMENT-OPERATED PLANTS

SEC. 4. Except as provided in section 5 hereof, in any case in which possession of any plant, mine, or facility has been or shall be hereafter taken under the authority granted by section 9 of the Selective Training and Service Act of 1940, as amended, such plant, mine, or facility, while so possessed, shall be operated under the terms and conditions of employment which were in effect at the time possession of such plant, mine, or facility was so taken.

APPLICATION TO WAR LABOR BOARD FOR CHANGE IN TERMS OF EMPLOYMENT
AT GOVERNMENT-OPERATED PLANTS

SEC. 5. When possession of any plant, mine, or facility has been or shall be hereafter taken under authority of section 9 of the Selective Training and Service Act of 1940, as amended, the Government agency operating such plant, mine, or facility, or a majority of the employees of such plant, mine, or facility or their representative, may apply to the National War Labor Board for a change in wages or other terms or conditions of employment in such plant, mine, or facility. Upon receipt of any such application, and after such hearings and investigations at it deems necessary, such Board may order any

changes in such wages, or other terms and conditions, which it deems to be fair and reasonable and not in conflict with any Act of Congress or any Executive order issued thereunder. Any such order of the Board shall, upon approval by the President, be complied with by the Government agency operating such plant, mine, or facility.

INTERFERENCE WITH GOVERNMENT OPERATION OF PLANTS

SEC. 6. (a) Whenever any plant, mine, or facility is in the possession of the United States, it shall be unlawful for any person (1) to coerce, instigate, induce, conspire with, or encourage any person, to interfere, by lock-out, strike, slow-down, or other interruption, with the operation of such plant, mine, or facility, or (2) to aid any such lock-out, strike, slow-down, or other interruption interfering with the operation of such plant, mine, or facility by giving direction or guidance in the conduct of such interruption, or by providing funds for the conduct or direction thereof or for the payment of strike, unemployment, or other benefits to those participating therein. No individual shall be deemed to have violated the provisions of this section by reason only of his having ceased work or having refused to continue to work or to accept employment.

(b) Any person who willfully violates any provision of this section shall be subject to a fine or not more than \$5,000, or to imprisonment for not more than one year, or both.

FUNCTIONS AND DUTIES OF THE NATIONAL WAR LABOR BOARD

SEC. 7. (a) The National War Labor Board (hereinafter in this section called the "Board"), established by Executive Order Numbered 9017, dated January 12, 1942, in addition to all powers conferred on it by section 1 (a) of the Emergency Price Control Act of 1942, and by any Executive order or regulation issued under the provisions of the Act of October 2, 1942, entitled "An Act to amend the Emergency Price Control Act of 1942, to aid in preventing inflation, and for other purposes", and by any other statute, shall have the following powers and duties:

(1) Whenever the United States Conciliation Service (hereinafter called the "Conciliation Service") certifies that a labor dispute exists which may lead to substantial interference with the war effort, and cannot be settled by collective bargaining or conciliation, to summon both parties to such dispute before it and conduct a public hearing on the merits of the dispute. If in the opinion of the Board a labor dispute has become so serious that it may lead to substantial interference with the war effort, the Board may take such action on its own motion. At such hearing both parties shall be given full notice and opportunity to be heard, but the failure of either party to appear shall not deprive the Board of jurisdiction to proceed to a hearing and order.

(2) To decide the dispute, and provide by order the wages and hours and all other terms and conditions (customarily included in collective-bargaining agreements) governing the relations between the parties, which shall be in effect until further order of the Board. In making any such decision the Board shall conform to the provisions of the Fair Labor Standards Act of 1938, as amended; the National Labor Relations Act; the Emergency Price Control Act of 1942, as amended; and the Act of

October 2, 1942, as amended, and all other applicable provisions of law; and where no other law is applicable the order of the Board shall provide for terms and conditions to govern relations between the parties which shall be fair and equitable to employer and employee under all the circumstances of the case.

(3) To require the attendance of witnesses and the production of such papers, documents, and records as may be material to its investigation of facts in any labor dispute, and to issue subpoenas requiring such attendance or production.

(4) To apply to any Federal district court for an order requiring any person within its jurisdiction to obey a subpoena issued by the Board; and jurisdiction is hereby conferred on any such court to issue such an order.

(b) The Board, by its Chairman, shall have power to issue subpoenas requiring the attendance and testimony of witnesses, and the production of any books, papers, records, or other documents, material to any inquiry or hearing before the Board or any designated member or agent thereof. Such subpoenas shall be enforceable in the same manner, and subject to the same penalties, as subpoenas issued by the President under title III of the Second War Powers Act, approved March 27, 1942.

(c) No member of the Board shall be permitted to participate in any decision in which such member has a direct interest as an officer, employee, or representative of either party to the dispute.

(d) Subsections (a) (1) and (2) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(e) The Board shall not have any powers under this section with respect to any matter within the purview of the Railway Labor Act, as amended.

NOTICE OF THREATENED INTERRUPTIONS IN WAR PRODUCTION, ETC.

SEC. 8. (a) In order that the President may be apprised of labor disputes which threaten seriously to interrupt war production, and in order that employees may have an opportunity to express themselves, free from restraint or coercion, as to whether they will permit such interruptions in wartime —

(1) The representative of the employees of a war contractor, shall give to the Secretary of Labor, the National War Labor Board, and the National Labor Relations Board, notice of any such labor dispute involving such contractor and employees, together with a statement of the issues giving rise thereto.

(2) For not less than thirty days after any notice under paragraph (1) is given, the contractor and his employees shall continue production under all the conditions which prevailed when such dispute arose, except as they may be modified by mutual agreement or by decision of the National War Labor Board.

(3) On the thirtieth day after notice under paragraph (1) is given by the representative of the employees, unless such dispute has been settled, the National Labor Relations Board shall forthwith take a secret ballot of the employees in the plant, plants, mine, mines, facility, facilities, bargaining unit, or bargaining units, as the case may be, with respect to which the dispute is applicable on the question whether they will permit any such interruption of war production. The National Labor Relations

Board shall include on the ballot a concise statement of the major issues involved in the dispute and of the efforts being made and the facilities being utilized for the settlement of such dispute. The National Labor Relations Board shall by order forthwith certify the results of such balloting, and such results shall be open to public inspection. The National Labor Relations Board may provide for preparing such ballot and distributing it to the employees at any time after such notice has been given.

(b) Subsection (a) shall not apply with respect to any plant, mine, or facility of which possession has been taken by the United States.

(c) Any person who is under a duty to perform any act required under subsection (a) and who willfully fails or refuses to perform such act shall be liable for damages resulting from such failure or refusal to any person injured thereby and to the United States if so injured. The district courts of the United States shall have jurisdiction to hear and determine any proceedings instituted pursuant to this subsection in the same manner and to the same extent as in the case of proceedings instituted under section 24 (14) of the Judicial Code.

POLITICAL CONTRIBUTIONS BY LABOR ORGANIZATIONS

SEC. 9. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251), is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political officer, or for any corporation whatever, or any labor organization to make a contribution in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' shall have the same meaning as under the National Labor Relations Act."

TERMINATION OF ACT

SEC. 10. Except as to offenses committed prior to such date, the provisions of this Act and the amendments made by this Act shall cease to be effective at the end of six months following the termination of hostilities in the present war, as proclaimed by the President or upon the date (prior to the date of such proclamation) of the passage of a concurrent resolution of the two Houses of Congress stating that such provisions and amendments shall cease to be effective.

SEPARABILITY

SEC. 11. If any provision of this Act or of any amendment made by this Act, or the application of such provision to any person or circumstance, is held invalid, the remainder of the Act and of such amendments, and the application of such provision to other persons or circumstances, shall not be affected thereby.

APPENDIX C

EXTRACT FROM TELEGRAPH MERGER ACT (57 Stat. 5)

AN ACT

To amend the Communications Act of 1934, as amended, to permit consolidations and mergers of domestic telegraph carriers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Communications Act of 1934, as amended, is amended by adding at the end of title II the following new section:

"CONSOLIDATIONS AND MERGERS OF TELEGRAPH CARRIERS

"SEC. 222. (a) As used in this section —

"(1) The term 'consolidation or merger' includes the legal consolidation or merger of two or more corporations, and the acquisition by a corporation through purchase, lease, or in any other manner, of the whole or any part of the property, securities, facilities, services, or business of any other corporation or corporations, or the control thereof, in exchange for its own securities, or otherwise.

"(2) The term 'domestic telegraph carrier' means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from domestic telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

"(3) The term 'international telegraph carrier' means any common carrier by wire or radio, the major portion of whose traffic and revenues is derived from international telegraph operations; and such term includes a corporation owning or controlling any such common carrier.

"(4) The term 'consolidated or merged carrier' means any carrier by wire or radio which acquires or operates the properties and facilities unified and integrated by consolidation or merger.

"(5) The term 'domestic telegraph operations' includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland and terminate or originate at points within the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, or Newfoundland, and includes acceptance, transmission, reception, or delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into and points of destination within, the continental United States with respect to record communications by wire or radio which either originate or terminate outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, and also includes the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States: *Provided*, That nothing in this section shall prevent international telegraph carriers from accepting and delivering international telegraph messages in the cities which constitute gateways approved by the Commission as points of entrance into or exit from the continental United States, under regulations prescribed by the Commission, and the incidental transmission or reception of

the same over its own or leased lines or circuits within the continental United States.

"(6) The term 'international telegraph operations' includes acceptance, transmission, reception, and delivery of record communications by wire or radio which either originate or terminate at points outside the continental United States, Alaska, Canada, Saint Pierre-Miquelon, Mexico, and Newfoundland, but does not include acceptance, transmission, reception, and delivery performed within the continental United States between points of origin within and points of exit from, and between points of entry into, and points of destination within, the continental United States with respect to such communications, or the transmission within the continental United States of messages which both originate and terminate outside but transit through the continental United States.

"(7) The terms 'domestic telegraph properties' and 'domestic telegraph facilities' mean properties and facilities, respectively, used or to be used in domestic telegraph operations.

"(8) The term 'employee' or 'employees' (i) shall include any individual who is absent from active service because of furlough, illness, or leave of absence, except that there shall be no obligation upon the consolidated or merged carrier to reemploy any employee who is absent because of furlough, except in accordance with the terms of his furlough, and (ii) shall not include any employee of any carrier which is a party to a consolidation or merger pursuant to this section to the extent that he is employed in any business which such carrier continues to operate independently of the consolidation or merger.

"(9) The term 'representative' includes any individual or labor organization.

"(10) The term 'continental United States' means the several States and the District of Columbia. * * *

"(f) (1) Each employee of any carrier which is a party to a consolidation or merger pursuant to this section who was employed by such carrier immediately preceding the approval of such consolidation or merger, and whose period of employment began on or before March 1, 1941, shall be employed by the carrier resulting from such consolidation or merger for a period of not less than four years from the date of the approval of such consolidation or merger, and during such period no such employee shall, without his consent, have his compensation reduced or be assigned to work which is inconsistent with his past training and experience in the telegraph industry.

"(2) If any employee of any carrier which is a party to any such consolidation or merger, who was employed by such carrier immediately preceding the approval of such consolidation or merger, and whose period of employment began after March 1, 1941, is discharged as a consequence of such consolidation or merger by the carrier resulting therefrom, within four years from the date of approval of the consolidation or merger, such carrier shall pay such employee at the time he is discharged severance pay in cash equal to the amount of salary or compensation he would have received during the full four-week period immediately preceding such discharge at the rate of compensation or salary payable to him during such period, multiplied by the number of years he has been continuously employed immediately preceding such discharge by one or another of such carriers who were parties to such consolidation or merger, but in no case shall any such employee receive less severance pay than the amount of salary or compensation he would have re-

ceived at such rate if he were employed during such full four-week period: *Provided, however*, That such severance pay shall not be required to be paid to any employee who is discharged after the expiration of a period, following the date of approval of the consolidation or merger, equal to the aggregate period during which such employee was in the employ, prior to such date of approval, of one or more of the carriers which are parties to the consolidation or merger.

"(3) For a period of four years after the date of approval of any such consolidation or merger, any employee of any carrier which is a party to such consolidation or merger who was such an employee on such date of approval, and who is discharged as a result of such consolidation or merger, shall have a preferential hiring and employment status for any position for which he is qualified by training and experience over any person who has not theretofore been an employee of any such carrier.

"(4) If any employee is transferred from one community to another, as a result of any such consolidation or merger, the carrier resulting therefrom shall pay, in addition to such employee's regular compensation as an employee of such carrier, the actual traveling expenses of such employee and his family, including the cost of packing, crating, drayage, and transportation of household goods and personal effects.

"(5) In the case of any consolidation or merger pursuant to this section, the consolidated or merger carrier shall accord to every employee or former employee, or representative or beneficiary of an employee or former employee, of any carrier which is a party to such consolidation or merger, the same pension, health, disability, or death insurance benefits, as were provided for prior to the date of approval of the consolidation or merger, under any agreement or plan of any carrier which is a party to the consolidation or merger which covered the greatest number of the employees affected by the consolidation or merger; except that in any case in which, prior to the date of approval of the consolidation or merger, an individual has exercised his right of retirement, or any right to health, disability, or death insurance benefits has accrued, under any agreement or plan of any carrier which is a party to the consolidation or merger, pension, health, disability, or death insurance benefits, as the case may be, shall be accorded in conformity with the agreement or plan under which such individual exercised such right of retirement or under which such right to benefits accrued. For purposes of determining and according the rights and benefits specified in this paragraph, any period spent in the employ of the carrier of which such individual was an employee at the time of the consolidation or merger shall be considered to have been spent in the employ of the consolidated or merged carrier. The application for approval of any consolidation or merger under this section shall contain a guaranty by the proposed consolidated carrier that there will be no impairment of any of the rights or benefits specified in this paragraph.

"(6) Any employee who, since August 27, 1940, has left a position, other than a temporary position, in the employ of any carrier which is a party to any such consolidation or merger, for the purpose of entering the military or naval forces of the United States, shall be considered to have been in the employ of such carrier during the time he is a member of such forces, and, upon making an application for employment with the consolidated or merged carrier within forty days from the time he is relieved from service in any of such forces under honorable conditions, such former employee shall be employed by the consolidated or merged carrier and entitled to the benefits to

which he would have been entitled if he had been employed by one of such carriers during all of such period of service with such forces; except that this paragraph shall not require the consolidated or merged carrier, in the case of any such individual, to pay compensation, or to accord health, disability, or death insurance benefits, for the period during which he was a member of such forces. If any such former employee is disabled and because of such disability is no longer qualified to perform the duties of his former position but otherwise meets the requirements for employment, he shall be given such available employment at an appropriate rate of compensation as he is able to perform and to which his service credit shall entitle him.

"(7) No employee of any carrier which is a party to any such consolidation or merger shall, without his consent, have his compensation reduced, or (except as provided in paragraph (2) and paragraph (8) of this subsection) be discharged or furloughed during the four-year period after the date of the approval of such consolidation or merger. No such employee shall, without his consent, have his compensation reduced, or be discharged or furloughed, in contemplation of such consolidation and merger, during the six-month period immediately preceding such approval.

"(8) Nothing contained in this subsection shall be construed to prevent the discharge of any employee for insubordination, incompetency, or any other similar cause.

"(9) All employees of any carrier resulting from any such consolidation or merger, with respect to their hours of employment, shall retain the rights provided by any collective bargaining agreement in force and effect upon the date of approval of such consolidation or merger until such agreement is terminated, executed, or superseded. Notwithstanding any other provision of this Act, any agreement not prohibited by law pertaining to the protection of employees may hereafter be entered into by such consolidated or merged carrier and the duly authorized representative or representatives of its employees selected according to existing law.

"(10) For purposes of enforcement or protection of rights, privileges, and immunities granted or guaranteed under this subsection, the employees of any such consolidated or merged carrier shall be entitled to the same remedies as are provided by the National Labor Relations Act in the case of employees covered by that Act; and the National Labor Relations Board and the courts of the United States (including the courts of the District of Columbia) shall have jurisdiction and power to enforce and protect such rights, privileges, and immunities in the same manner as in the case of enforcement of the provisions of the National Labor Relations Act.

"(11) Nothing contained in this subsection shall apply to any employee of any carrier which is a party to any such consolidation or merger whose compensation is at the rate of more than \$5,000 per annum.

"(12) Notwithstanding the provisions of paragraphs (1) and (7), the protection afforded therein for the period of four years from the date of approval of the consolidation or merger shall not, in the case of any particular employee, continue for a longer period, following such date of approval, than the aggregate period during which such employee was in the employ, prior to such date of approval, of one or more of the carriers which are parties to the consolidation or merger. As used in paragraphs (1), (2), and (7), the term 'compensation' shall not include compensation attributable to overtime not guaranteed by collective bargaining agreements."

APPENDIX D

LABOR MANAGEMENT RELATIONS ACT, 1947

[PUBLIC LAW 101 — 80TH CONGRESS]

[CHAPTER 120 — 1ST SESSION]

[H. R. 3020]

AN ACT

To amend the National Labor Relations Act, to provide additional facilities for the mediation of labor disputes affecting commerce, to equalize legal responsibilities of labor organizations and employers, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE AND DECLARATION OF POLICY

SECTION 1. (a) This Act may be cited as the "Labor Management Relations Act, 1947".

(b) Industrial strife which interferes with the normal flow of commerce and with the full production of articles and commodities for commerce, can be avoided or substantially minimized if employers, employees, and labor organizations each recognize under law one another's legitimate rights in their relations with each other, and above all recognize under law that neither party has any right in its relations with any other to engage in acts or practices which jeopardize the public health, safety, or interest.

It is the purpose and policy of this Act, in order to promote the full flow of commerce, to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce, to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.

TITLE I — AMENDMENT OF NATIONAL LABOR RELATIONS ACT

SEC. 101. The National Labor Relations Act is hereby amended to read as follows:

"FINDINGS AND POLICIES

"SECTION 1. The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce,

or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

"The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

"Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

"Experience has further demonstrated that certain practices by some labor organizations, their officers, and members have the intent or the necessary effect of burdening or obstructing commerce by preventing the free flow of goods in such commerce through strikes and other forms of industrial unrest or through concerted activities which impair the interest of the public in the free flow of such commerce. The elimination of such practices is a necessary condition to the assurance of the rights herein guaranteed.

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

"DEFINITIONS

"Sec. 2. When used in this Act —

"(1) The term 'person' includes one or more individuals, labor organizations, partnerships, associations, corporations, legal representatives, trustees, trustees in bankruptcy, or receivers.

"(2) The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any corporation or association operating a hospital, if no part of the net earnings inures to the benefit of any private shareholder or individual, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

"(3) The term 'employee' shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly

states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

"(4) The term 'representatives' includes any individual or labor organization.

"(5) The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

"(6) The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

"(7) The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

"(8) The term 'unfair labor practice' means any unfair labor practice listed in section 8.

"(9) The term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee.

"(10) The term 'National Labor Relations Board' means the National Labor Relations Board provided for in section 3 of this Act.

"(11) The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

"(12) The term 'professional employee' means—

"(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an

advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes; or

"(b) any employee, who (1) has completed the courses of specialized intellectual instruction and study described in clause (iv) of paragraph (a), and (ii) is performing related work under the supervision of a professional person to qualify himself to become a professional employee as defined in paragraph (a).

"(13) In determining whether any person is acting as an 'agent' of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

"NATIONAL LABOR RELATIONS BOARD

"SEC. 3. (a) The National Labor Relations Board (hereinafter called the 'Board') created by this Act prior to its amendment by the Labor Management Relations Act, 1947, is hereby continued as an agency of the United States, except that the Board shall consist of five instead of three members, appointed by the President by and with the advice and consent of the Senate. Of the two additional members so provided for, one shall be appointed for a term of five years and the other for a term of two years. Their successors, and the successors of the other members, shall be appointed for terms of five years each, excepting that any individual chosen to fill a vacancy shall be appointed only for the unexpired term of the member whom he shall succeed. The President shall designate one member to serve as Chairman of the Board. Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause.

"(b) The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise. A vacancy in the Board shall not impair the right of the remaining members to exercise all of the powers of the Board, and three members of the Board shall, at all times, constitute a quorum of the Board, except that two members shall constitute a quorum of any group designated pursuant to the first sentence hereof. The Board shall have an official seal which shall be judicially noticed.

"(c) The Board shall at the close of each fiscal year make a report in writing to Congress and to the President stating in detail the cases it has heard, the decisions it has rendered, the names, salaries, and duties of all employees and officers in the employ or under the supervision of the Board, and an account of all moneys it has disbursed.

"(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints

before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law.

"SEC. 4. (a) Each member of the Board and the General Counsel of the Board shall receive a salary of \$12,000 a year, shall be eligible for re-appointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local, or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis.

"(b) All of the expenses of the Board, including all necessary traveling and subsistence expenses outside the District of Columbia incurred by the members or employees of the Board under its orders, shall be allowed and paid on the presentation of itemized vouchers therefor approved by the Board or by any individual it designates for that purpose.

"SEC. 5. The principal office of the Board shall be in the District of Columbia, but it may meet and exercise any or all of its powers at any other place. The Board may, by one or more of its members or by such agents or agencies as it may designate, prosecute any inquiry necessary to its functions in any part of the United States. A member who participates in such an inquiry shall not be disqualified from subsequently participating in a decision of the Board in the same case.

"SEC. 6. The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this Act.

"RIGHTS OF EMPLOYEES

"SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

"UNFAIR LABOR PRACTICES

"SEC. 8. (a) It shall be an unfair labor practice for an employer—

"(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

"(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

"(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8 (a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective-bargaining unit covered by such agreement when made; and (ii) if, following the most recent election held as provided in section 9 (e) the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to authorize such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for non-membership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act;

"(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

"(b) It shall be an unfair labor practice for a labor organization or its agents —

"(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7: *Provided*, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein; or (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances;

"(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

"(3) to refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9 (a);

"(4) to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is: (A) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person; (B) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9; (C) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provisions of section 9, (D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class, unless such employer is failing to conform to an order or certification of the Board determining the bargaining representative for employees performing such work: *Provided*, That nothing contained in this subsection (b) shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under this Act;

"(5) to require of employees covered by an agreement authorized under subsection (a) (3) the payment, as a condition precedent to becoming a member of such organization, of a fee in an amount which the Board finds excessive or discriminatory under all the circumstances. In making such a finding, the Board shall consider, among other relevant factors, the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected; and

"(6) to cause or attempt to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not be performed.

"(c) The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.

"(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, That

where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —

“(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

“(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

“(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

“(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9 (a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within the sixty-day period specified in this subsection shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.

“REPRESENTATIVES AND ELECTIONS

“SEC. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

"(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: *Provided*, That the Board shall not (1) decide that any unit is appropriate for such purposes if such unit includes both professional employees and employees who are not professional employees unless a majority of such professional employees vote for inclusion in such unit; or (2) decide that any craft unit is inappropriate for such purposes on the ground that a different unit has been established by a prior Board determination, unless a majority of the employees in the proposed craft unit vote against separate representation or (3) decide that any unit is appropriate for such purposes if it includes, together with other employees, any individual employed as a guard to enforce against employees and other persons rules to protect property of the employer or to protect the safety of persons on the employer's premises; but no labor organization shall be certified as the representative of employees in a bargaining unit of guards if such organization admits to membership, or is affiliated directly or indirectly with an organization which admits to membership, employees other than guards.

"(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board —

"(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representative as the representative defined in section 9 (a), or (ii) assert that the individual or labor organization, which has been certified or is being currently recognized by their employer as the bargaining representative, is no longer a representative as defined in section 9 (a); or

"(B) by an employer, alleging that one or more individuals or labor organizations have presented to him a claim to be recognized as the representative defined in section 9 (a);

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

"(2) In determining whether or not a question of representation affecting commerce exists, the same regulations and rules of decision shall apply irrespective of the identity of the persons filing the petition or the kind of relief sought and in no case shall the Board deny a labor organization a place on the ballot by reason of an order with respect to such labor organization or its predecessor not issued in conformity with section 10 (c).

"(3) No election shall be directed in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held. Employees on strike who are not entitled to reinstatement shall not be eligible to vote. In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing

for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election.

"(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

"(5) In determining whether a unit is appropriate for the purposes specified in subsection (b) the extent to which the employees have organized shall not be controlling.

"(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

"(e) (1) Upon the filing with the Board by a labor organization, which is the representative of employees as provided in section 9 (a), of a petition alleging that 30 per centum or more of the employees within a unit claimed to be appropriate for such purposes desire to authorize such labor organization to make an agreement with the employer of such employees requiring membership in such labor organization as a condition of employment in such unit, upon an appropriate showing thereof the Board shall, if no question of representation exists, take a secret ballot of such employees, and shall certify the results thereof to such labor organization and to the employer.

"(2) Upon the filing with the Board, by 30 per centum or more of the employees in a bargaining unit covered by an agreement between their employer and a labor organization made pursuant to section 8 (a) (3) (ii), of a petition alleging they desire that such authority be rescinded, the Board shall take a secret ballot of the employees in such unit, and shall certify the results thereof to such labor organization and to the employer.

"(3) No election shall be conducted pursuant to this subsection in any bargaining unit or any subdivision within which, in the preceding twelve-month period, a valid election shall have been held.

"(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing —

"(1) the name of such labor organization and the address of its principal place of business;

"(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeded \$5,000,

and the amount of the compensation and allowances paid to each such officer or agent during such year;

"(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

"(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

"(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

"(6) a detailed statement of, or reference to provisions of its constitution and bylaws showing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has —

"(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

"(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

"(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, no petition under section 9 (e) (1) shall be entertained, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

"(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, no petition under section 9 (e) (1) shall be entertained, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by

any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

"PREVENTION OF UNFAIR LABOR PRACTICES

"SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this Act or has received a construction inconsistent therewith.

"(b) Whenever it is charged that any person has engaged in or is engaging in any such unfair labor practice, the Board, or any agent or agency designated by the Board for such purposes, shall have power to issue and cause to be served upon such person a complaint stating the charges in that respect, and containing a notice of hearing before the Board or a member thereof, or before a designated agent or agency, at a place therein fixed, not less than five days after the serving of said complaint: *Provided*, That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed forces, in which event the six-month period shall be computed from the day of his discharge. Any such complaint may be amended by the member, agent, or agency conducting the hearing or the Board in its discretion at any time prior to the issuance of an order based thereon. The person so complained of shall have the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint. In the discretion of the member, agent, or agency conducting the hearing or the Board, any other person may be allowed to intervene in the said proceeding and to present testimony. Any such proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, adopted by the Supreme Court of the United States pursuant to the Act of June 19, 1934 (U. S. C., title 28, secs. 723-B, 723-C).

"(c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without

back pay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him: *And provided further*, That in determining whether a complaint shall issue alleging a violation of section 8 (a) (1) or section 8 (a) (2), and in deciding such cases, the same regulations and rules of decision shall apply irrespective of whether or not the labor organization affected is affiliated with a labor organization national or international in scope. Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order. If upon the preponderance of the testimony taken the Board shall not be of the opinion that the person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue an order dismissing the said complaint. No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual was suspended or discharged for cause. In case the evidence is presented before a member of the Board, or before an examiner or examiners thereof, such member, or such examiner or examiners, as the case may be, shall issue and cause to be served on the parties to the proceeding a proposed report, together with a recommended order, which shall be filed with the Board, and if no exceptions are filed within twenty days after service thereof upon such parties, or within such further period as the Board may authorize, such recommended order shall become the order of the Board and become effective as therein prescribed.

"(d) Until a transcript of the record in a case shall have been filed in a court, as hereinafter provided, the Board may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it.

"(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the

record considered as a whole shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Board, its member, agent, or agency, the court may order such additional evidence to be taken before the Board, its members, agent, or agency, and to be made a part of the transcript. The Board may modify its findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and it shall file such modified or new findings, which findings with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive, and shall file its recommendations, if any, for the modification or setting aside of its original order. The jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the appropriate circuit court of appeals if application was made to the district court as hereinabove provided, and by the Supreme Court of the United States upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

“(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

“(g) The commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order.

“(h) When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order on the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled ‘An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes’, approved March 23, 1932 (U. S. C., Supp. VII, title 29, secs. 101-115).

“(i) Petitions filed under this Act shall be heard expeditiously, and if possible within ten days after they have been docketed.

"(j) The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court of the United States (including the District Court of the United States for the District of Columbia), within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

"(k) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (D) of section 8 (b), the Board is empowered and directed to hear and determine the dispute out of which such unfair labor practice shall have arisen, unless, within ten days after notice that such charge has been filed, the parties to such dispute submit to the Board satisfactory evidence that they have adjusted, or agreed upon methods for the voluntary adjustment of, the dispute. Upon compliance by the parties to the dispute with the decision of the Board or upon such voluntary adjustment of the dispute, such charge shall be dismissed.

"(1) Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4) (A), (B), or (C) of section 8 (b), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any district court of the United States (including the District Court of the United States for the District of Columbia) within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law: *Provided further*, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. Upon filing of any such petition the courts shall cause notice thereof to be served upon any person involved in the charge and such person, including the charging party, shall be given an opportunity to appear by counsel and present any relevant testimony: *Provided further*, That for the purposes of this subsection district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in promoting or protecting the interests of employee members. The service of legal process upon such officer or agent shall constitute service upon the labor organization and make such organization a party to the suit.

In situations where such relief is appropriate the procedure specified herein shall apply to charges with respect to section 8 (b) (4) (D).

"INVESTIGATORY POWERS

"SEC. 11. For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by section 9 and section 10 —

"(1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.

"(2) In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States or the United States courts of any Territory or possession, or the District Court of the United States for the District of Columbia, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

"(3) No person shall be excused from attending and testifying or from producing books, records, correspondence, documents, or other evidence in obedience to the subpoena of the Board, on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no individual shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, except that such individual so testifying shall not be exempt from prosecution and punishment for perjury committed in so testifying.

"(4) Complaints, orders, and other process and papers of the Board, its member, agent, or agency, may be served either personally or by registered

mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served. The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and the return post office receipt or telegraph receipt therefor when registered and mailed or telegraphed as aforesaid shall be proof of service of the same. Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

"(5) All process of any court to which application may be made under this Act may be served in the judicial district wherein the defendant or other person required to be served resides or may be found.

"(6) The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board.

"SEC. 12. Any person who shall willfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than \$5,000 or by imprisonment for not more than one year, or both.

"LIMITATIONS

"SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

"SEC. 14. (a) Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.

"(b) Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

"SEC. 15. Wherever the application of the provisions of section 272 of chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States', approved July 1, 1898, and Acts amendatory thereof and supplementary thereto (U. S. C., title 11, sec. 672), conflicts with the application of the provisions of this Act, this Act shall prevail: *Provided*, That in any situation where the provisions of this Act cannot be validly enforced, the provisions of such other Acts shall remain in full force and effect.

"SEC. 16. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

"SEC. 17. This Act may be cited as the 'National Labor Relations Act'."

EFFECTIVE DATE OF CERTAIN CHANGES

SEC. 102. No provision of this title shall be deemed to make an unfair labor practice any act which was performed prior to the date of the enactment of this Act which did not constitute an unfair labor practice prior thereto, and the provisions of section 8 (a) (3) and section 8 (b) (2) of the National Labor Relations Act as amended by this title shall not make an unfair labor practice the performance of any obligation under a collective-bargaining agreement entered into prior to the date of the enactment of this Act, or (in the case of an agreement for a period of not more than one year) entered into on or after such date of enactment, but prior to the effective date of this title, if the performance of such obligation would not have constituted an unfair labor practice under section 8 (3) of the National Labor Relations Act prior to the effective date of this title, unless such agreement was renewed or extended subsequent thereto.

SEC. 103. No provisions of this title shall affect any certification of representatives or any determination as to the appropriate collective-bargaining unit, which was made under section 9 of the National Labor Relations Act prior to the effective date of this title until one year after the date of such certification or if, in respect of any such certification, a collective-bargaining contract was entered into prior to the effective date of this title, until the end of the contract period or until one year after such date, whichever first occurs.

SEC. 104. The amendments made by this title shall take effect sixty days after the date of the enactment of this Act, except that the authority of the President to appoint certain officers conferred upon him by section 3 of the National Labor Relations Act as amended by this title may be exercised forthwith.

TITLE II — CONCILIATION OF LABOR DISPUTES IN INDUSTRIES AFFECTING COMMERCE; NATIONAL EMERGENCIES

SEC. 201. That it is the policy of the United States that —

(a) sound and stable industrial peace and the advancement of the general welfare, health, and safety of the Nation and of the best interests of employers and employees can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees;

(b) the settlement of issues between employers and employees through collective bargaining may be advanced by making available full and adequate governmental facilities for conciliation, mediation, and voluntary arbitration to aid and encourage employers and the representatives of their employees to reach and maintain agreements concerning rates of pay, hours, and working conditions, and to make all reasonable efforts to settle their differences by mutual agreement reached through conferences and collective bargaining or by such methods as may be provided for in any applicable agreement for the settlement of disputes; and

(c) certain controversies which arise between parties to collective-bargaining agreements may be avoided or minimized by making available full and adequate governmental facilities for furnishing assistance to employers and the representatives of their employees in formulating for

inclusion within such agreements provision for adequate notice of any proposed changes in the terms of such agreements, for the final adjustment of grievances or questions regarding the application or interpretation of such agreements, and other provisions designed to prevent the subsequent arising of such controversies.

SEC. 202. (a) There is hereby created an independent agency to be known as the Federal Mediation and Conciliation Service (herein referred to as the "Service", except that for sixty days after the date of the enactment of this Act such term shall refer to the Conciliation Service of the Department of Labor). The Service shall be under the direction of a Federal Mediation and Conciliation Director (hereinafter referred to as the "Director"), who shall be appointed by the President by and with the advice and consent of the Senate. The Director shall receive compensation at the rate of \$12,000 per annum. The Director shall not engage in any other business, vocation, or employment.

(b) The Director is authorized, subject to the civil-service laws, to appoint such clerical and other personnel as may be necessary for the execution of the functions of the Service, and shall fix their compensation in accordance with the Classification Act of 1923, as amended, and may, without regard to the provisions of the civil-service laws and the Classification Act of 1923, as amended, appoint and fix the compensation of such conciliators and mediators as may be necessary to carry out the functions of the Service. The Director is authorized to make such expenditures for supplies, facilities, and services as he deems necessary. Such expenditures shall be allowed and paid upon presentation of itemized vouchers therefor approved by the Director or by any employee designated by him for that purpose.

(c) The principal office of the Service shall be in the District of Columbia, but the Director may establish regional offices convenient to localities in which labor controversies are likely to arise. The Director may by order, subject to revocation at any time, delegate any authority and discretion conferred upon him by this Act to any regional director, or other officer or employee of the Service. The Director may establish suitable procedures for cooperation with State and local mediation agencies. The Director shall make an annual report in writing to Congress at the end of the fiscal year.

(d) All mediation and conciliation functions of the Secretary of Labor or the United States Conciliation Service under section 8 of the Act entitled "An Act to create a Department of Labor", approved March 4, 1913 (U. S. C., title 29, sec. 51), and all functions of the United States Conciliation Service under any other law are hereby transferred to the Federal Mediation and Conciliation Service, together with the personnel and records of the United States Conciliation Service. Such transfer shall take effect upon the sixtieth day after the date of enactment of this Act. Such transfer shall not affect any proceedings pending before the United States Conciliation Service or any certification, order, rule, or regulation theretofore made by it or by the Secretary of Labor. The Director and the Service shall not be subject in any way to the jurisdiction or authority of the Secretary of Labor or any official or division of the Department of Labor.

FUNCTIONS OF THE SERVICE

SEC. 203. (a) It shall be the duty of the Service, in order to prevent or minimize interruptions of the free flow of commerce growing out of labor

disputes, to assist parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation.

(b) The Service may proffer its services in any labor dispute in any industry affecting commerce, either upon its own motion or upon the request of one or more of the parties to the dispute, whenever in its judgment such dispute threatens to cause a substantial interruption of commerce. The Director and the Service are directed to avoid attempting to mediate disputes which would have only a minor effect on interstate commerce if State or other conciliation services are available to the parties. Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement.

(c) If the Director is not able to bring the parties to agreement by conciliation within a reasonable time, he shall seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out, or other coercion, including submission to the employees in the bargaining unit of the employer's last offer of settlement for approval or rejection in a secret ballot. The failure or refusal of either party to agree to any procedure suggested by the Director shall not be deemed a violation of any duty or obligation imposed by this Act.

(d) Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

SEC. 204. (a) In order to prevent or minimize interruptions of the free flow of commerce growing out of labor disputes, employers and employees and their representatives, in any industry affecting commerce, shall—

(1) exert every reasonable effort to make and maintain agreements concerning rates of pay, hours, and working conditions, including provision for adequate notice of any proposed change in the terms of such agreements;

(2) whenever a dispute arises over the terms or application of a collective-bargaining agreement and a conference is requested by a party or prospective party thereto, arrange promptly for such a conference to be held and endeavor in such conference to settle such dispute expeditiously; and

(3) in case such dispute is not settled by conference, participate fully and promptly in such meetings as may be undertaken by the Service under this Act for the purpose of aiding in a settlement of the dispute.

SEC. 205. (a) There is hereby created a National Labor-Management Panel which shall be composed of twelve members appointed by the President, six of whom shall be selected from among persons outstanding in the field of management and six of whom shall be selected from among persons outstanding in the field of labor. Each member shall hold office for a term of three years, except that any member appointed to fill a vacancy occurring prior to the expiration of the term for which his predecessor was appointed shall be appointed for the remainder of such term, and the terms of office of the members first taking office shall expire, as designated by the President at

the time of appointment, four at the end of the first year, four at the end of the second year, and four at the end of the third year after the date of appointment. Members of the panel, when serving on business of the panel, shall be paid compensation at the rate of \$25 per day, and shall also be entitled to receive an allowance for actual and necessary travel and subsistence expenses while so serving away from their places of residence.

(b) It shall be the duty of the panel, at the request of the Director, to advise in the avoidance of industrial controversies and the manner in which mediation and voluntary adjustment shall be administered, particularly with reference to controversies affecting the general welfare of the country.

NATIONAL EMERGENCIES

SEC. 206. Whenever in the opinion of the President of the United States, a threatened or actual strike or lock-out affecting an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce, will, if permitted to occur or to continue, imperil the national health or safety, he may appoint a board of inquiry to inquire into the issues involved in the dispute and to make a written report to him within such time as he shall prescribe. Such report shall include a statement of the facts with respect to the dispute, including each party's statement of its position but shall not contain any recommendations. The President shall file a copy of such report with the Service and shall make its contents available to the public.

SEC. 207. (a) A board of inquiry shall be composed of a chairman and such other members as the President shall determine, and shall have power to sit and act in any place within the United States and to conduct such hearings either in public or in private, as it may deem necessary or proper, to ascertain the facts with respect to the causes and circumstances of the dispute.

(b) Members of the board of inquiry shall receive compensation at the rate of \$50 for each day actually spent by them in the work of the board, together with necessary travel and subsistence expenses.

(c) For the purpose of any hearing or inquiry conducted by any board appointed under this title, the provisions of sections 9 and 10 (relating to the attendance of witnesses and the production of books, papers, and documents) of the Federal Trade Commission Act of September 16, 1914, as amended (U. S. C. 19, title 15, secs. 49 and 50, as amended), are hereby made applicable to the powers and duties of such board.

SEC. 208. (a) Upon receiving a report from a board of inquiry the President may direct the Attorney General to petition any district court of the United States having jurisdiction of the parties to enjoin such strike or lock-out or the continuing thereof, and if the court finds that such threatened or actual strike or lock-out—

(i) affects an entire industry or a substantial part thereof engaged in trade, commerce, transportation, transmission, or communication among the several States or with foreign nations, or engaged in the production of goods for commerce; and

(ii) if permitted to occur or to continue, will imperil the national health or safety, it shall have jurisdiction to enjoin any such strike or

lock-out, or the continuing thereof, and to make such other orders as may be appropriate.

(b) In any case, the provisions of the Act of March 23, 1932, entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", shall not be applicable.

(c) The order or orders of the court shall be subject to review by the appropriate circuit court of appeals and by the Supreme Court upon writ of certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 29, secs. 346 and 347).

SEC. 209. (a) Whenever a district court has issued an order under section 208 enjoining acts or practices which imperil or threaten to imperil the national health or safety, it shall be the duty of the parties to the labor dispute giving rise to such order to make every effort to adjust and settle their differences, with the assistance of the Service created by this Act. Neither party shall be under any duty to accept, in whole or in part, any proposal of settlement made by the Service.

(b) Upon the issuance of such order, the President shall reconvene the board of inquiry which has previously reported with respect to the dispute. At the end of a sixty-day period (unless the dispute has been settled by that time), the board of inquiry shall report to the President the current position of the parties and the efforts which have been made for settlement, and shall include a statement by each party of its position and a statement of the employer's last offer of settlement. The President shall make such report available to the public. The National Labor Relations Board, within the succeeding fifteen days, shall take a secret ballot of the employees of each employer involved in the dispute on the question of whether they wish to accept the final offer of settlement made by their employer as stated by him and shall certify the results thereof to the Attorney General within five days thereafter.

SEC. 210. Upon the certification of the results of such ballot or upon a settlement being reached, whichever happens sooner, the Attorney General shall move the court to discharge the injunction, which motion shall then be granted and the injunction discharged. When such motion is granted, the President shall submit to the Congress a full and comprehensive report of the proceedings, including the findings of the board of inquiry and the ballot taken by the National Labor Relations Board, together with such recommendations as he may see fit to make for consideration and appropriate action.

COMPILATION OF COLLECTIVE BARGAINING AGREEMENTS, ETC.

SEC. 211. (a) For the guidance and information of interested representatives of employers, employees, and the general public, the Bureau of Labor Statistics of the Department of Labor shall maintain a file of copies of all available collective bargaining agreements and other available agreements and actions thereunder settling or adjusting labor disputes. Such file shall be open to inspection under appropriate conditions prescribed by the Secretary of Labor, except that no specific information submitted in confidence shall be disclosed.

(b) The Bureau of Labor Statistics in the Department of Labor is authorized to furnish upon request of the Service, or employers, employees, or their representatives, all available data and factual information which may aid in the settlement of any labor dispute, except that no specific information submitted in confidence shall be disclosed.

EXEMPTION OF RAILWAY LABOR ACT

SEC. 212. The provisions of this title shall not be applicable with respect to any matter which is subject to the provisions of the Railway Labor Act, as amended from time to time.

TITLE III

SUITS BY AND AGAINST LABOR ORGANIZATIONS

SEC. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

RESTRICTIONS ON PAYMENTS TO EMPLOYEE REPRESENTATIVES

SEC. 302. (a) It shall be unlawful for any employer to pay or deliver, or to agree to pay or deliver, any money or other thing of value to any representative of any of his employees who are employed in an industry affecting commerce.

(b) It shall be unlawful for any representative of any employees who are employed in an industry affecting commerce to receive or accept, or to agree to receive or accept, from the employer of such employees any money or other thing of value.

(c) The provisions of this section shall not be applicable (1) with respect to any money or other thing of value payable by an employer to any representative who is an employee or former employee of such employer, as compensation for, or by reason of, his services as an employee of such employer;

(2) with respect to the payment or delivery of any money or other thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement or release of any claim, complaint, grievance, or dispute in the absence of fraud or duress; (3) with respect to the sale or purchase of an article or commodity at the prevailing market price in the regular course of business; (4) with respect to money deducted from the wages of employees in payment of membership dues in a labor organization: *Provided*, That the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner; or (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided*, That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing or unemployment benefits or life insurance, disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of the employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees or made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities.

(d) Any person who willfully violates any of the provisions of this section shall, upon conviction thereof, be guilty of a misdemeanor and be subject to a fine of not more than \$10,000 or to imprisonment for not more than one year, or both.

(e) The district courts of the United States and the United States courts of the Territories and possessions shall have jurisdiction, for cause shown, and subject to the provisions of section 17 (relating to notice to opposite party) of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U. S. C., title 28, sec. 381), to restrain violations of

this section, without regard to the provisions of sections 6 and 20 of such Act of October 15, 1914, as amended (U. S. C., title 15, sec. 17, and title 29, sec. 52), and the provisions of the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes", approved March 23, 1932 (U. S. C., title 29, secs. 101-115).

(f) This section shall not apply to any contract in force on the date of enactment of this Act, until the expiration of such contract, or until July 1, 1948, whichever first occurs.

(g) Compliance with the restrictions contained in subsection (c) (5) (B) upon contributions to trust funds, otherwise lawful, shall not be applicable to contributions to such trust funds established by collective agreement prior to January 1, 1946, nor shall subsection (c) (5) (A) be construed as prohibiting contributions to such trust funds if prior to January 1, 1947, such funds contained provisions for pooled vacation benefits.

BOYCOTTS AND OTHER UNLAWFUL COMBINATIONS

SEC. 303. (a) It shall be unlawful, for the purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in, or to induce or encourage the employees of any employer to engage in, a strike or a concerted refusal in the course of their employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services, where an object thereof is —

(1) forcing or requiring any employer or self-employed person to join any labor or employer organization or any employer or other person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person;

(2) forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9 of the National Labor Relations Act;

(3) forcing or requiring any employer to recognize or bargain with a particular labor organization as the representative of his employees if another labor organization has been certified as the representative of such employees under the provision of section 9 of the National Labor Relations Act;

(4) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class unless such employer is failing to conform to an order or certification of the National Labor Relations Board determining the bargaining representative for employees performing such work. Nothing contained in this subsection shall be construed to make unlawful a refusal by any person to enter upon the premises of any employer (other than his own employer), if the employees of such employer are engaged in a strike ratified or approved by a representative of such employees whom such employer is required to recognize under the National Labor Relations Act.

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

RESTRICTIONS ON POLITICAL CONTRIBUTIONS

SEC. 304. Section 313 of the Federal Corrupt Practices Act, 1925 (U. S. C., 1940 edition, title 2, sec. 251; Supp. V, title 50, App., sec. 1509), as amended, is amended to read as follows:

"SEC. 313. It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or in connection with any primary election or political convention or caucus held to select candidates for any political office, or for any corporation whatever, or any labor organization to make a contribution or expenditure in connection with any election at which Presidential and Vice Presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to Congress are to be voted for, or in connection with any primary election or political convention or caucus held to select candidates for any of the foregoing offices, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation or labor organization which makes any contribution or expenditure in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation, or officer of any labor organization, who consents to any contribution or expenditure by the corporation or labor organization, as the case may be, in violation of this section shall be fined not more than \$1,000 or imprisoned for not more than one year, or both. For the purposes of this section 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

STRIKES BY GOVERNMENT EMPLOYEES

SEC. 305. It shall be unlawful for any individual employed by the United States or any agency thereof including wholly owned Government corporations to participate in any strike. Any individual employed by the United States or by any such agency who strikes shall be discharged immediately from his employment, and shall forfeit his civil service status, if any, and shall not be eligible for re-employment for three years by the United States or any such agency.

TITLE IV

CREATION OF JOINT COMMITTEE TO STUDY AND REPORT ON BASIC PROBLEMS AFFECTING FRIENDLY LABOR RELATIONS AND PRODUCTIVITY

SEC. 401. There is hereby established a joint congressional committee to be known as the Joint Committee on Labor-Management Relations (hereafter referred to as the committee), and to be composed of seven Members of the

Senate Committee on Labor and Public Welfare, to be appointed by the President pro tempore of the Senate, and seven Members of the House of Representatives Committee on Education and Labor, to be appointed by the Speaker of the House of Representatives. A vacancy in membership of the committee shall not affect the powers of the remaining members to execute the functions of the committee, and shall be filled in the same manner as the original selection. The committee shall select a chairman and a vice chairman from among its members.

SEC. 402. The committee, acting as a whole or by subcommittee, shall conduct a thorough study and investigation of the entire field of labor-management relations, including but not limited to —

- (1) the means by which permanent friendly cooperation between employers and employees and stability of labor relations may be secured throughout the United States;

- (2) the means by which the individual employee may achieve a greater productivity and higher wages, including plans for guaranteed annual wages, incentive profit-sharing and bonus systems;

- (3) the internal organization and administration of labor unions, with special attention to the impact on individuals of collective agreements requiring membership in unions as a condition of employment;

- (4) the labor relations policies and practices of employers and associations of employers;

- (5) the desirability of welfare funds for the benefit of employees and their relation to the social-security system;

- (6) the methods and procedures for best carrying out the collective-bargaining processes, with special attention to the effects of industry-wide or regional bargaining upon the national economy;

- (7) the administration and operation of existing Federal laws relating to labor relations; and

- (8) such other problems and subjects in the field of labor-management relations as the committee deems appropriate.

SEC. 403. The committee shall report to the Senate and the House of Representatives not later than March 15, 1948, the results of its study and investigation, together with such recommendations as to necessary legislation and such other recommendations as it may deem advisable, and shall make its final report not later than January 2, 1949.

SEC. 404. The committee shall have the power, without regard to the civil-service laws and the Classification Act of 1923, as amended, to employ and fix the compensation of such officers, experts, and employees as it deems necessary for the performance of its duties, including consultants who shall receive compensation at a rate not to exceed \$35 for each day actually spent by them in the work of the committee, together with their necessary travel and subsistence expenses. The committee is further authorized, with the consent of the head of the department or agency concerned, to utilize the services, information, facilities, and personnel of all agencies in the executive branch of the Government and may request the governments of the several States, representatives of business, industry, finance, and labor, and such other persons, agencies, organizations, and instrumentalities as it deems appropriate to attend its hearings and to give and present information, advice, and recommendations.

SEC. 405. The committee, or any subcommittee thereof, is authorized to

hold such hearings; to sit and act at such times and places during the sessions, recesses, and adjourned periods of the Eightieth Congress; to require by subpoena or otherwise the attendance of such witnesses and the production of such books, papers, and documents; to administer oaths; to take such testimony; to have such printing and binding done; and to make such expenditures within the amount appropriated therefor; as it deems advisable. The cost of stenographic services in reporting such hearings shall not be in excess of 25 cents per one hundred words. Subpenas shall be issued under the signature of the chairman or vice chairman of the committee and shall be served by any person designated by them.

SEC. 406. The members of the committee shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the performance of the duties vested in the committee, other than expenses in connection with meetings of the committee held in the District of Columbia during such times as the Congress is in session.

SEC. 407. There is hereby authorized to be appropriated the sum of \$150,000, or so much thereof as may be necessary, to carry out the provisions of this title, to be disbursed by the Secretary of the Senate on vouchers signed by the chairman.

TITLE V

DEFINITIONS

SEC. 501. When used in this Act—

(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

(2) The term "strike" includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective-bargaining agreement) and any concerted slow-down or other concerted interruption of operations by employees.

(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

SAVING PROVISION

SEC. 502. Nothing in this Act shall be construed to require an individual employee to render labor or service without his consent, nor shall anything in this Act be construed to make the quitting of his labor by an individual employee an illegal act; nor shall any court issue any process to compel the performance by an individual employee of such labor or service, without his consent; nor shall the quitting of labor by an employee or employees in good faith because of abnormally dangerous conditions for work at the place of employment of such employee or employees be deemed a strike under this Act.

SEPARABILITY

SEC. 503. If any provision of this Act, or the application of such provision to any person or circumstance, shall be held invalid, the remainder of this Act, or the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected thereby.

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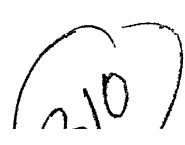
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